

Michigan Journal of International Law

Volume 15 | Issue 2

1994

United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond

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UNITED NATIONS INTERVENTION IN INTERNAL CONFLICTS: IRAQ, SOMALIA, AND BEYOND

Ruth Gordon*

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This article is dedicated to the memory of my cherished sister Marguerite Anna Pressley who was always the wind beneath my wings and my biggest fan.

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INTRODUCTION

Nonintervention is a fundamental principle of international law that is based upon the sovereignty, equality, and political independence of States.¹ It imposes a duty on States to refrain from intervention in the internal affairs of other States. Although this obligation also extends to international organizations,² the literature on this subject has tended to focus upon unilateral intervention in internal conflicts, rather than on intervention by international organizations.³ In the post-Cold War era, however, it is the United Nations (also referred to as the Organization) that is being called upon to resolve a myriad of civil conflicts,⁴ and the

1. *E.g.*, Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 106 (June 27); *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR 1st Comm., 20th Sess., Annex 3, Agenda Item 107, at 10, U.N. Doc. A/6220 (1965) [hereinafter *Declaration on Inadmissibility of Intervention*]; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287-95 (3d ed. 1979); *see also infra* notes 6-9 and accompanying text.

2. U.N. CHARTER art. 2, ¶ 7; BROWNLIE, *supra* note 1, at 293-95.

3. *E.g.*, HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard Lillich ed., 1973); INTERVENTION IN WORLD POLITICS (Hedley Bull ed., 1984); LAW & CIVIL WAR IN THE MODERN WORLD (John Norton Moore ed., 1974); THE INTERNATIONAL LAW OF CIVIL WAR (Richard A. Falk ed., 1971); John Norton Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 191 (1983); John A. Perkins, *The Right of Counterintervention*, 17 GA. J. INT'L & COMP. L. 171 (1987). The superpower rivalry which characterized the Cold War, and the relative impotence of the United Nations during this era, made this focus logical. *See* Secretary-General's Address at University of Bordeaux (Apr. 24, 1991) (on file with the author). This powerlessness was clearly relative, however, for the United Nations played a role in a number of conflicts that were outside the immediate spheres of influence of the superpowers. *See* THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING, U.N. Sales No. E.90.I.18 (2d ed. 1990) [hereinafter BLUE HELMETS].

4. Civil war, or internal conflict, has been defined in a number of ways. For instance, Professor Sohn states that a civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State or when a large portion of the State rises in arms against a legitimate government. Louis B. Sohn, *The Role of the United Nations in Civil Wars*, 57 AM. SOC'Y INT'L L. PROC. 208, 208 (1963). Another definition maintains that it is armed conflict between an established government and one or more insurgent

focus is accordingly beginning to shift.⁵ Interventions undertaken by international organizations, as compared to unilateral interventions by States, are for different purposes,⁶ utilize different methods,⁷ are clothed with a legitimacy unilateral interventions lack,⁸ and raise additional legal concerns.⁹

movements whose aim is to overthrow the government or the political, economic, or social order of the State. Roger Myers, *A New Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention in an Internal Conflict*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 1, 96 (1990). Internal conflict has also been defined to cover any movement which for economic, social, racial, ideological, or other reasons aims at overthrowing the government by the use of force and changing the structure of the State. Ellen Frey-Wouters, *The Relevance of Regional Arrangements to Internal Conflicts in the Developing World*, in LAW AND CIVIL WAR IN THE MODERN WORLD, *supra* note 3, at 458, 459. In U.N. practice, it may include internal strife that has yet to ripen into civil war, but nonetheless represents a significant threat to international harmony. Internal conflict has also been defined as conflict within a State involving violence between nationals of the same State. Oscar Schachter, *The United Nations and Internal Conflict*, in LAW AND CIVIL WAR IN THE MODERN WORLD, *supra* note 3, at 401 [hereinafter Schachter, *U.N. & Internal Conflict*]. Internal strife will be broadly defined here to encompass all of these definitions and to include all but minor, short-lived riots and disturbances that are not in opposition to, or an attempt to transform the government or structure of, the State.

5. Paul Lewis, *Peacekeeper to Peacemaker: U.N. Confronting New Roles*, N.Y. TIMES, Jan. 25, 1993, at A1; Ian Davidson, *Peace, But Not At Any Price*, FIN. TIMES, June 19, 1993, at 8; see also Thomas G. Weiss, *New Challenges for UN Military Operations: Implementing Agenda for Peace*, WASH. Q., Winter 1993, at 51; *The United Nations: Heart of Gold, Limbs of Clay*, ECONOMIST, June 12, 1993, at 21.

6. Evan Luard, *Collective Intervention*, in INTERVENTION IN WORLD POLITICS, *supra* note 3, at 157-58. Unilateral interventions are generally to achieve the national interests of the intervenor. Multilateral interventions, on the other hand, have sought to maintain international peace and security, maintain national sovereignty and independence, advance self-determination, promote and protect fundamental human rights, alleviate massive suffering, and advance the economic and social development of developing countries. Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 401. Of course, in the process, unilateral interests may also be furthered.

7. Luard, *supra* note 6, at 159. Unilateral intervention can be forcible or nonforcible, but the discussion has focused primarily on covert or overt military intervention. Until recently, multilateral interventions have generally been nonmilitary or nonforcible military undertakings that utilized peacekeepers or observers with the authority to use force only in self-defense. The increasing use of multilateral military force has made intervention more intrusive and more analogous, in this respect, to unilateral intervention. This development has prompted a closer examination of the legal parameters governing these actions.

8. *Id.* at 157-58. Legitimacy stems from the more collective purposes of multilateral, as opposed to unilateral, intervention. Recent Security Council operations in Iraq and perhaps Somalia, as well as a lack of action in Bosnia-Herzegovina, have caused some commentators and Member States to question the motives of the Security Council. Such doubts could weaken the legitimacy of military intervention by international organizations.

9. See, e.g., INIS L. CLAUDE, *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATIONS* 181-90 (4th ed. 1971) (discussing the debate over the extent of the U.N.'s legal jurisdiction to intervene). There is overlap in the international instruments and customary international law principles governing unilateral and multilateral intervention. The permissibility of action by organizations, however, also raises questions regarding the degree to which aspects of State sovereignty have been ceded to the organization by its members and what measures are permissible under the constituent instruments creating the organization. These are international institutional legal issues revolving around the Charter as a constitutional instrument. *Id.*

The United Nations is,¹⁰ and will increasingly be called upon¹¹ to intervene in many more internal conflicts,¹² on a much broader scale, and in a more proactive fashion than has been the case in the past.¹³ This reflects changed perceptions regarding such concepts as: domestic jurisdiction, which seems to have further shrunk;¹⁴ "threat" to the peace, which appears to be an ever-broadening category;¹⁵ and the mission of the Organization in internal conflicts, which necessitates a stronger, more democratic institution utilizing rules of law to the greatest extent possible.¹⁶ Against this background, this article will analyze some of the

10. E.g., BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE: PREVENTIVE DIPLOMACY, PEACEMAKING AND PEACEKEEPING (1992); *Disunited Nations*, FIN. TIMES (London), June 15, 1993, at 19; Paul Lewis, *The U.N. Is Showing Promise as Poll Watcher for the World*, N.Y. TIMES, May 30, 1993, § 4, at 3; Lewis, *supra* note 5, at A1; *Polishing Blue Helmets*, ECONOMIST, May 1, 1993, at 39. There are numerous situations where the Security Council is being called upon to play some role, be it prominent or modest. Resolutions have been passed on the civil strife in Liberia, Afghanistan, Haiti, Sudan, Angola, and South Africa. Troops have been deployed in Iraq, Somalia, Croatia, Bosnia-Herzegovina, Macedonia, Rwanda, and Cambodia, with major undertakings in Cambodia, Croatia, Bosnia-Herzegovina, and Somalia. The Council is also playing a role in the reconciliation process in El Salvador.

11. See Brian Urquhart, *Beyond the 'Sheriff's Posse'*, 32 SURVIVAL 196, 200-01 (1990); see also Weiss, *supra* note 5, at 51, 57-65; Alan Riding, *Rights Forum Ends in Call for a Greater Role by U.N.*, N.Y. TIMES, June 26, 1993, at A2; *Stronger Role Seen for United Nations in Keeping the Peace*, FIN. TIMES (London), July 17, 1991, § 1, at 4. Potential major conflagrations are also brewing in parts of the former Soviet Union, Zaire, and Burma. See, e.g., *U.N. Criticizes Russia Claim to Sevastopol*, UPI, July 20, 1993, available in LEXIS, News Library, UPI File; *Georgia: Endangered Species Fights for Life*, Reuter Textline, July 25, 1993, available in LEXIS, World Library, TXTNWS File; *Major Georgian Offensive Reported in Abkhazia*, Agence France Presse, Aug. 2, 1993, available in LEXIS, World Library, AEP File; *U.N. Special Envoy Arrives in Zaire*, Reuter Library Report, July 18, 1993, available in LEXIS, World Library, TXTNWS File; Paul Lewis, *U.N. Panel Rebukes Burmese Military Rulers*, N.Y. TIMES, Dec. 6, 1992, at 10.

12. E.g., Paul Lewis, *Europeans Urge the U.N. to Act More Aggressively to Prevent War*, N.Y. TIMES, Sept. 23, 1992, at A16; Cesar A. Chelala, *How to Punish Men With Unruly Political Ambitions*, L.A. TIMES, May 24, 1992, at M2.

13. E.g., Jonathan Moore, *The U.N.'s New Mission: Nation-Building*, L.A. TIMES, June 27, 1993, at M1. In Cambodia, the Organization undertook a multimillion dollar operation that included direct control over administrative agencies, bodies, and offices in such fields as, *inter alia*, foreign affairs, national defense, and finance. The Organization was also responsible for protecting human rights. While assisting domestic forces in assuming responsibility for all of these tasks, the Organization organized and carried out elections, disarmed regular forces, and monitored the withdrawal of foreign troops. *Financing of the United Nations Transitional Authority in Cambodia Addendum Initial Phase of the Implementation Plan; Report of the Secretary-General*, U.N. GAOR, 46th Sess., U.N. Doc. A/46/235/Add.1. In Somalia, the Organization has undertaken its first corrective chapter VII enforcement action, which includes disarming militias and other portions of the population and rebuilding civil authority and institutions in the country.

14. See *infra* part I.

15. See *infra* part II.B.

16. See *infra* part III.

legal issues entailed in U.N. intervention in situations of civil strife.¹⁷

Part I of this article will examine the concept of domestic jurisdiction.¹⁸ One of the principal purposes of the United Nations is the maintenance of international peace and security, which in 1946 was thought to essentially entail maintaining the peace between nation States. Internal power struggles and conflicts were thought to be within the jurisdiction of the State where they took place, unless they posed a rather substantial "threat" to the peace.¹⁹ Thus, the drafters of the U.N. Charter made sharp distinctions between internal and international conflicts.²⁰ For instance, the Charter generally proscribes international, but not domestic, conflict,²¹ and the U.N. Security Council is accorded primary responsibility for maintaining international, not internal, peace and security.²² The Charter also contains a specific prohibition on intervention in matters that are essentially within the domestic jurisdiction of

17. A tension exists between the constitutional quandaries and the substantive dilemmas with which organizations are designed to grapple. Constitutional problems consist of internal matters related to the management and functioning of the organization, while substantive problems are external issues requiring solutions. The dividing line between the two is not precise because the nature and intensity of world problems determine the nature and scope of organizational efforts, thereby defining the constitutional problems which emerge. CLAUDE, *supra* note 9, at 83. The constitutional problems addressed in this article are raised by the new role being thrust upon the United Nations by international events occasioned by the ending of the Cold War. Professor Claude postulates that we must strike a balance between obsessive concern with institutional problems, which make international organization an end in itself, and exclusive concentration upon the substantive issues of current world politics, which neglects the building of an adequate institutional apparatus for international relations. *Id.* at 84. This article attempts to meld both by taking into account both current trends and long-term institutional needs.

18. The Charter of the United Nations does not refer to internal conflicts. Rather, it refers to the domestic jurisdiction of States in article 2(7). Paul C. Szasz, *Role of the United Nations in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 345, 345 (1983).

19. The U.N. Charter states:

The purposes of the United Nations are: 1. To maintain *international* peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means and in conformity with principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

U.N. CHARTER art. 1, ¶ 1 (emphasis added). The peace to be maintained here is "international" peace. Unless there are international implications, the purpose is not to keep internal peace or to intervene in civil wars. LELAND M. GOODRICH & EDVARD HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 59 (1946).

20. Because of this distinction, it is quite logical to argue that the United Nations has little or no role in most internal conflicts. See Mary Ellen O'Connell, *Commentary on International Law: Continuing Limits on UN Intervention in Civil War*, 67 IND. L.J. 903 (1992).

21. U.N. CHARTER art. 2, ¶ 4; ROBERT E. RIGGS & JACK C. PLANO, *THE UNITED NATIONS: INTERNATIONAL ORGANIZATIONS AND WORLD POLITICS* 24-25 (1988).

22. U.N. CHARTER art. 24.

Member States, unless there is a need for enforcement measures under chapter VII.²³

Domestic jurisdiction is a malleable concept, however, that is based upon the current state of international relations.²⁴ In the years since its founding, the Organization's jurisdiction has been steadily expanding at the expense of the domestic jurisdiction of its members, and in the post-Cold War era the evolution in this direction has escalated. Given the numerous conditions that have historically internationalized internal conflicts,²⁵ as well as the recent Security Council resolutions on internal conflicts in Somalia,²⁶ Haiti,²⁷ and Iraq,²⁸ civil strife of any significance may no longer be "essentially within the domestic jurisdiction of Member States." International peace and security are being more broadly defined, and the protection of human rights is increasingly considered a matter of international concern.²⁹ Thus, intervention by the Organization

23. *Id.* art. 2, ¶ 7. Enforcement measures are permissible only upon a Security Council finding that, at a minimum, there is a "threat" to the peace or upon a finding of a "breach" of the peace or act of aggression. *Id.* art. 39. Consequently, domestic conflicts had to be a threat to international peace before the Security Council could exercise jurisdiction. In practice, a much lesser showing has sufficed. *See infra* part I.C.1. The domestic jurisdiction prohibition would also forbid intervention by other organs if a matter is deemed domestic because it is included within the general principles that guide the entire Organization.

24. *See generally* Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921, 1923 P.C.I.J. (ser. B) No. 4, at 156 [hereinafter *Nationality Decrees Advisory Opinion*].

25. The factors suggested by Professor Paul Szasz, former legal counsel to the United Nations, include: major acts of international outrage during the course of the conflict; size, intensity, and length of the conflict; likelihood of intervention by outside powers which might assist either the government in power, the insurgents, or groups of countries assisting both sides; actual or potential spill-over across international borders; classification as a colonial conflict; significant violations of human rights; and subjection of some parts of the dispute to international agreement. Szasz, *supra* note 18, at 245-51.

26. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 2-4, U.N. Doc. S/RES/794 (1992); S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg. at 1, U.N. Doc. S/RES/814 (1993).

27. S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg. at 2-4, U.N. Doc. S/RES/841 (1993).

28. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 2, U.N. Doc. S/RES/688 (1991).

29. Religious and ethnic sensitivities abound, making foreign intervention, and the possibility of sparking unrest in other States, more likely. Nationalism is exploding as colonial and communist borders collapse or are challenged, thus causing instability and the likelihood that internal strife in neighboring States may exacerbate. Intolerance of human rights violations has increased and apparently now includes failure to permit the delivery of humanitarian aid. This last development may make it easier to bring internal conflicts within the purview of the international community because a faction may simply attack relief workers or refuse to permit deliveries of supplies. Serious and systematic human rights violations are no longer essentially within the domestic jurisdiction of States. What is controversial is whether the Organization can forcibly intervene to protect such rights. *See* David Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253 (1992). Moreover, given the impact internal conflicts invariably have on surrounding States, either because of

should no longer be objectionable on domestic jurisdiction grounds.

Even where internal strife becomes essentially international, however, aspects of these conflicts should remain within the domestic realm. Arguably, what makes these conflicts international is their impact upon world peace or human rights.³⁰ Consequently, the competence to choose a social, economic, or political order is still within the domestic jurisdiction of States,³¹ absent some grave "threat" to the peace. Thus, while the conflict may be within international jurisdiction, the Organization should deal with only those aspects that make the conflict international, and measures that decide or coerce a decision on economic, social, or political matters remain impermissible.³² Recent Security Council measures to the contrary are problematic.³³

After determining in Part I that internal conflicts are generally within the jurisdiction of the Organization, Part II will turn to the specific acts that can be undertaken by various bodies of the Organization in the exercise of this jurisdiction. Intervention by the General Assembly, which has only a recommendatory rôle, is limited to passing nonmandatory resolutions.³⁴ The Security Council, however, can take

refugees or a spill-over in the fighting, it may be that where internal strife erupts, it truly is an international matter and of concern to the international community.

30. One of the principal purposes of the Organization is to maintain international peace and security. U.N. CHARTER art. 1, ¶ 1; *id.* chs. VI, VII, VIII. The Charter also contains provisions on human rights. *Id.* pmbl., art. 1, ¶ 3, arts. 55, 56. The *travaux préparatoires* indicate that human rights ranked far below the protection of national sovereignty and the maintenance of international peace. Tom Farer, *An Inquiry Into the Legitimacy of Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 185, 188-91 (Lori F. Damrosch & David J. Scheffer eds., 1991).

31. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 106 (June 27); *see also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the U.N. Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter *Declaration on Friendly Relations*].

32. Assisting peoples in exercising their rights in these spheres is another matter, although the distinction is not always clear. Compelling a particular decision on these matters may also violate other Charter provisions, such as the provision on self-determination. *See Oscar Schachter, Authorized Uses of Force by the United Nations and Regional Organizations*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, *supra* note 30, at 65, 83-84 [hereinafter Schachter, *Authorized Uses of Force*].

33. For example, S.C. Res. 841, *supra* note 27, appears to take a position on the legitimate government of Haiti and imposes economic sanctions until that government is reinstated. In Somalia, the United Nations has militarily attacked and called for the arrest of one of the faction leaders, effectively eliminating him from the political reconciliation process.

34. U.N. CHARTER art. 10. Nevertheless, the importance of these resolutions should not be underestimated. For instance, the General Assembly can recommend the establishment of peace-keeping forces. Advisory Opinion, *Certain Expenses of the United Nations*, 1962 I.C.J. 151 (July 20). A series of resolutions, accompanied by the establishment of bodies to exert pressure, can also have an effect upon internal matters. The measures taken against South Africa provide one example. Luard, *supra* note 6, at 160. Moreover, the Uniting for Peace

more drastic measures such as imposing mandatory economic sanctions and mandating forcible military measures.³⁵ The Security Council has jurisdiction when there is a "potential threat"³⁶ (generally referred to in this article as a "danger" to the peace)³⁷ or actual "threat" to the peace.³⁸ Given the indeterminate nature of the concept "potential threat to the peace," only minor internal friction of limited duration may, in the present international milieu, be outside the definition of "danger" to the peace.³⁹ Almost all internal struggles can eventually become militarized, and any military conflict has the potential of spilling over borders, causing an exodus of refugees, or inviting outside intervention.⁴⁰ Consequently, internal conflicts may be *prima facie* "dangers" to the peace, and the peaceful settlement mechanisms under chapter VI should be made available to all parties requesting assistance in settling the dispute.⁴¹ One of the most difficult issues is distinguishing between a

Resolution permits the Assembly to act when the Security Council fails to act because of a veto. While use of the veto is unusual these days, it still exists, leaving some residual, albeit nonenforcement, power with the Assembly. See *infra* note 241; cf. Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 442-45.

35. U.N. CHARTER arts. 39, 41, 42. It can also play a role in the peaceful settlement process (chapter VI) and has residuary authority to discharge its responsibilities to maintain the peace. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 3, 52 (Jan. 26).

36. U.N. CHARTER art. 34.

37. This useful terminology has been suggested by N.D. White to avoid the cumbersome references employed in the Charter. N.D. WHITE, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 36 (1990).

38. U.N. CHARTER art. 39.

39. Since "potential threat" originally included only serious disputes, see generally LELAND M. GOODRICH & ANNE P. SIMONS, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* (1955), defining "potential threat" may help determine when internal friction really is so minor in character that there is no constructive role for the Organization to play. Given the political constraints at work, and because precedent is always an issue, the dividing line will emerge. Hopefully, Member States can devise a scheme that will permit discussion and dispute settlement before militarization of the situation.

40. For example, religious or ethnic ties may precipitate intervention. States may perceive achievement of geopolitical goals by taking advantage of such crises. Of course, the opposite result may transpire. No State may have sufficient interest in the conflict and the country may disintegrate as a nation State, as in Somalia. The question then becomes whether a situation which is of international concern is also a "danger" to the peace.

41. While no mandatory decisions can be taken under chapter VI, the extensive resources of the Organization could be instrumental in heading off or resolving conflicts. BOUTROS-GHALI, *supra* note 10, at 11-19. This does not preclude the use of regional arrangements, which the Charter encourages. See U.N. CHARTER arts. 52-54. These organizations have been rather ineffective as of late, however. See, e.g., Marc Weller, *The International Response to the Dissolution of the Socialist Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992). Currently under the Charter, only the State involved, other Member States, the Security Council, or the Secretary General can bring a matter before the Organization under chapter VI. U.N. CHARTER arts. 33-38. This article examines whether this option should also be made

"danger" and a "threat" to the peace.⁴² The need to sharpen this distinction is illustrated by recent events which indicate that the international community is moving towards a new definition of "threat" to the peace that requires something less than even the potential for incursions across international boundaries.⁴³

If there has been a shift from domestic to international jurisdiction, the international institutions to which this jurisdiction has been transferred must be democratized and strengthened. This is the focus of Part III of this article. As commentators call for a right to democracy within States,⁴⁴ the time is also ripe to adopt these ideals in international institutions. As with unilateral intervention, intervention by a small body that can authorize military force, and is dominated by large powers,⁴⁵ raises concerns about the objectives behind its actions.⁴⁶ To alleviate these misgivings, the Security Council must become a more democratic body so that its decisions to intervene possess the requisite legitimacy.⁴⁷

Democratization might include expanding the Security Council and

available to entities in conflict with the government in power. U.N. practice indicates that there is some precedent for insurgents to participate in negotiations under U.N. auspices. Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 427.

42. This question is crucial, of course, because a "threat to the peace" permits the use of mandatory nonforcible and forcible measures. See U.N. CHARTER ch. VII.

43. Although this was also arguably the case in Southern Rhodesia, only nonforcible, albeit mandatory measures, were taken in Rhodesia. S.C. Res. 232, U.N. SCOR, 1340th mtg. at 141, U.N. Doc. S/RES/232 (1966). Moreover, the guerilla war against Southern Rhodesia eventually drew in some surrounding States, indicating a potential threat at the very least. In contrast, the Council has authorized the use of force in Somalia, although there are no indications of any planned military measures against Somali territory or emanating from internal Somali factions against surrounding States.

44. See, e.g., Thomas M. Franck, *The Emerging Right of Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

45. These nations can veto decisions against their own interest or those of their allies. See U.N. CHARTER art. 27, ¶ 3; Roger Matthews, *Arabs Urge U.N. to Impose Sanctions Against Israel*, FIN. TIMES, Jan. 13, 1993, at 3; *Israel on Its Own Hook*, ECONOMIST, Jan. 30, 1993, at 37; *Palestinians: Different Rules*, ECONOMIST, Jan. 16, 1993, at 42.

46. The impartiality of the Security Council has already been questioned. Security Council resolutions on Libya's refusal to extradite its nationals for prosecution in the United States, the United Kingdom, and France have been criticized for using the Council to carry out the foreign policy objectives of certain powerful members. Marc Weller, *Double Standards at the UN*, 142 NEW L.J. 360 (1992); Marc Weller, *Crisis for the New World Order*, 142 NEW L.J. 592 (1992). The U.S.-led war against Iraq may be another instance. See Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 523 (1991). Concerns of uneven enforcement were also raised with respect to enforcing resolutions against Israel. David Hoffman, *Arabs' Muted Reactions Reflect Changing Times: Iraq's Importance Wanes after Gulf War*, WASH. POST, Jan. 18, 1993, at A21.

47. Legitimacy has been defined by Professor Thomas Franck as "a property of a rule or a rule-making institution which in itself exerts a pull toward compliance normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process." THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990).

establishing mechanisms to consider and incorporate the views of diverse Member States⁴⁸ and nongovernmental organizations. Norms can be formulated not only in Security Council resolutions, but also in General Assembly resolutions and declarations, which could help articulate the expectations of the wider international community.⁴⁹ Consistency and openness in the decision-making process, to the extent practicable, could also assist in confidence building and in the articulation of norms.⁵⁰ Finally, there is a need for military contingents under U.N. control, which could permit a more effective and efficient use of military force.⁵¹ This could also help ensure that intervention is not a result of the preoccupation of particular States and that the United Nations does not refrain from acting because it is not in any State's particular interest to intercede.

I. THE RECEDING CONSTRAINT OF DOMESTIC JURISDICTION

A. *Unilateral Intervention in Internal Conflicts*

The sovereignty,⁵² equality,⁵³ and political independence of States

48. See W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 99 (1993). The views considered should come from States of varying sizes, at different levels of development, and with different cultures.

49. Since declarations and resolutions are nonbinding, the Security Council's hands would not be tied in any particular situation. Moreover, all Member States would take part in this process, including the members of the Security Council. Interestingly, three members of the Council are experiencing some degree of internal conflict or unrest: the Russian Federation, China, and the United Kingdom. Given the more general mood of cooperation, an attempt to formulate norms, especially in solemn declarations, could go a long way towards establishing a modicum of consensus on these issues.

50. For instance, explaining, either in the resolution or accompanying reports, why a situation is a "threat" to the peace puts Member States on notice of the types of situations which may pose a "threat" to the peace. Consistency may bring some long-standing internal conflicts, such as those in Northern Ireland and Tibet, within the purview of the Organization. See Myers, *supra* note 4, at 89-102; see also *infra* notes 104-10, 358-63 and accompanying text.

51. BOUTROS-GHALI, *supra* note 10, at 25.

52. Sovereignty includes exclusive jurisdiction over a territory and the permanent population living there. It entails obligations arising from customary international law and treaties, both of which are based upon the consent of States. The jurisdiction of international tribunals is dependent on State consent, as is membership in international organizations. Accordingly, the State is the master of what transpires within its territory. BROWNIE, *supra* note 1, at 287-88. The State system reflects traditional conceptions of international law as a body of rules made by and for sovereign States to govern their international relations. This configuration is currently justified by the need to control international conflict and tension. Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1, 36 (1989).

53. Sovereign equality means that all States have equal rights and duties and are equal members of the international community. States are juridically equal and enjoy the rights

impose upon them a duty to refrain from intervention in the internal affairs of other States.⁵⁴ This duty also extends to international organizations.⁵⁵ No intervention is permitted in matters that each State has a sovereign right to decide freely.⁵⁶ Intervention has been defined as encompassing a wide spectrum of action, ranging from any interference in a State's internal affairs, to dictatorial interference involving some form of military force.⁵⁷ With respect to internal conflicts, the discussion has generally centered upon foreign military forces assisting the government or, more problematically, the insurgency.⁵⁸ While forcible intervention may be

inherent in full sovereignty; they have a duty to respect the personality of other States. All States have the right freely to choose and develop their political, social, economic, and cultural systems and have a duty to comply fully and in good faith with their international obligations. *Declaration on Friendly Relations*, *supra* note 31, at 122. This is legal rather than political equality, however, given that States are manifestly unequal politically. R.P. Anand, *Sovereign Equality of States in International Law*, 197 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 9, 103-04 (1986-II).

54. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 106 (June 27); *see also* BROWNIE, *supra* note 1, at 287-95. The norm of nonintervention is well established in international law. In numerous international instruments, including binding treaties, and the declarations and resolutions of international organizations and conferences, States have evinced the view that nonforcible and forcible intervention are prohibited. *Id.*

55. The United Nations prohibition against intervention finds expression in article 2(7), which is addressed to the Organization, rather than to Member States. U.N. CHARTER art. 2, ¶ 7.

56. Military and Paramilitary Activities, 1986 I.C.J. at 108; Rosalyn Higgins, *Intervention in International Law*, in INTERVENTION IN WORLD POLITICS, *supra* note 3, at 29, 31. In this reserved domain, States may act with complete discretion because there is no obligation to act, or refrain from acting, in a particular manner. John M. Howell, *Domestic Questions in International Law*, 48 AM. SOC'Y INT'L L. PROC. 90, 97 (1954). Neither an international organization nor an individual State may hold a State accountable for its actions, for the reserved sphere is comprised of activities where a State's jurisdiction is not bound by international law. BROWNIE, *supra* note 1, at 291-92. For example, the choice of political, economic, social, and cultural systems, and the formulation of foreign policy, are within the domestic sphere. Military and Paramilitary Activities, 1986 I.C.J. at 108.

57. Higgins, *supra* note 56, at 30. The element of coercion is the essence of prohibited intervention. This includes force in the direct form of military action or in the indirect form of support for subversive or terrorist armed activities within another State. Military and Paramilitary Activities, 1986 I.C.J. at 108. Intervention may involve a use of force amounting to an "armed attack" under article 51 of the U.N. Charter. Perkins, *supra* note 3, at 174. Similarly, intervention may involve a use of force constituting a violation of article 2(4) of the Charter, but not constituting an armed attack. Finally, it may not involve a violation of article 2(4), but may constitute coercive interference of another character. *Id.* Prohibited intervention includes the use of economic, political, or any other measures to coerce another State to subordinate its sovereign rights. *Id.*; *see also* *Declaration on Friendly Relations*, *supra* note 31, at 121-24.

58. During the Cold War, the United States and the USSR often intervened in internal power struggles to support the side most sympathetic to their respective ideologies. This led to many discussions on the right of intervention and counterintervention. *See, e.g.*, Perkins, *supra* note 3; Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 R.C.A.D.I. 160 (1982) [hereinafter Schachter, *General Course*]. Intervention was also a lively topic with respect to revolutionary movements. *See, e.g.*, *Declaration on Friendly Relations*, *supra* note 31, at 121-24; John F. Murphy, *The United Nations and the Regulation of the Use of Force*, in THE UNITED NATIONS LEGAL ORDER (Christopher Joyner & Oscar Schachter eds., forthcoming June 1994); CHRISTOPHER O. QUAYE, *LIBERATION STRUGGLES IN INTERNATIONAL LAW* 287-300 (1991).

largely prohibited, other acts may be permissible.⁵⁹

Internal revolt has historically been a domestic matter, and a government could quell it in whatever manner permitted by domestic law.⁶⁰ This included engaging the assistance of foreign forces. Currently, however, norms governing intervention by foreign powers are uncertain, the subject of debate, and vacillate between several opposing approaches.⁶¹ Classical theory permits outside support for an incumbent government against internal political rebellion or secession,⁶² but considers similar support for insurgent contingents illegal.⁶³ A contrary view stresses that international

59. For instance, humanitarian aid for the benefit of the victims of a civil war or economic and technical aid that is not likely to have a substantial impact on the outcome of the war may be lawful. Schachter, *General Course*, *supra* note 58, at 162. While U.N. resolutions on nonintervention do not elucidate what acts are impermissible, such specification has been suggested. *Id.* at 161-62. In *Military and Paramilitary Activities*, 1986 I.C.J. at 125-26, the Court rejected the argument that various economic measures the United States took against Nicaragua violated the principle of nonintervention. These sanctions included the cessation of economic aid, a 90% reduction in the sugar quota, and a trade embargo. Nicaragua unsuccessfully argued that together these measures were a systematic violation of the principle of nonintervention. Nonforcible intervention may or may not be prohibited. See Damrosch, *supra* note 52, at 5; *Declaration on Friendly Relations*, *supra* note 31, at 121-24. Nonforcible intervention is not a violation of article 2(4) of the Charter, which prohibits the use of force against the territorial sovereignty or political independence of other States, and thus the analysis is somewhat different. Intervention is wrongful when it uses methods of coercion with regard to choices which must remain free ones. *Military and Paramilitary Activities*, 1986 I.C.J. at 98.

60. G.I.A.D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 254-55 (1983). Incumbent governments have considered internal power struggles to be exclusively domestic matters and thus outside the scope of international law. Yet international law has increasingly intervened. Bart De Schutter & Cristine Van De Wyngaert, *Coping with Non-International Armed Conflicts: The Borderline Between National and International Law*, 13 GA. J. INT'L & COMP. L. 279, 281 (1983).

61. Murphy, *supra* note 58.

62. JOHN F. MURPHY, *THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE: A LEGAL AND POLITICAL ANALYSIS* 137 (quoting Edwin B. Firmage, *Summary and Interpretation*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 405 (Richard A. Falk ed., 1971)). Professor Murphy explains that this approach dominated during the 19th and 20th centuries when aid to an incumbent government was generally regarded as legitimate. If the rebellion grew in size and persisted, rebels might be accorded insurgent status, although this status did not give rise to an obligation of neutrality by third-party States who remained free to assist the government, but were still precluded from assisting the insurgents. Only if the civil war endured did it become permissible, and perhaps obligatory, to recognize a condition of belligerency. Upon a formal recognition of belligerency, a duty of neutrality arose. This approach weakened as governments began to base their relationship to insurgents on their political preferences, rather than on legal criteria. It collapsed with the Spanish Civil War. *Id.*

63. In *Military and Paramilitary Activities*, the Court held that there is no general right of intervention in support of an opposition faction within another State in contemporary international law. *Military and Paramilitary Activities*, 1986 I.C.J. at 109; see also Szasz, *supra* note 18, at 348; Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 137 (1986). Professor Schachter comments that it is well established that a State acts illegally by sending armed forces or material to support an insurgency. The Declaration on Friendly Relations affirms that:

[e]very state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in

law has developed a stronger emphasis upon nonintervention as opposed to support for the de facto power.⁶⁴

In State practice, it appears that States consider themselves free to grant assistance to an incumbent government.⁶⁵ Yet most interventions are defended as counterinterventions, i.e., as responses to prior illegal interventions by third States in support of the other side.⁶⁶ This indicates some doubt as to contemporary opinio juris on the legality of certain interventions in internal conflict.⁶⁷ The International Court of Justice, however, seems to recognize the right of individual States to intervene on the side of the legitimate government.⁶⁸ Nevertheless, the Court might not sanction assistance to a government where outside support would violate the right of self-determination or threaten the political independence of the State.⁶⁹ As Professor Schachter so eloquently put it:

No state today would deny the basic principle that the people of a nation have the right under international law to decide for themselves what kind of government they want, and that this includes the right to revolt and to armed conflict among competing groups. For a foreign State to support, with "force", one side or the other in an internal conflict is to deprive the people in some measure of their right to decide the issue by themselves.⁷⁰

organized activities within its territory directed towards the commission of such acts, when the acts referred to . . . involve a threat or use of force.

Declaration on Friendly Relations, *supra* note 31, at 123. There may be an exception for assisting an insurgency in wars of national liberation against a disfavored government, such as South Africa. Murphy, *supra* note 62, at 136. The *Declaration on Friendly Relations*, in discussing equal rights and self-determination of peoples, states that if a State violates its duty to refrain from forcible action that deprives peoples subject to alien domination of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the principles and purposes of the U.N. *Declaration on Friendly Relations*, *supra* note 31, at 121-24. See generally Quayle, *supra* note 58.

64. Perkins, *supra* note 3, at 183-91.

65. Murphy, *supra* note 58. This assistance includes providing arms, military training, and even combat forces.

66. Schachter, *General Course*, *supra* note 58, at 160. Perkins, *supra* note 3, at 172-73.

67. See Perkins, *supra* note 3, at 173.

68. The Court stated: "[I]t is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already permitted at the request of the government of a State, were also to be allowed at the request of the opposition." *Military and Paramilitary Activities*, 1986 I.C.J. at 14, 126; see also Perkins, *supra* note 3, at 175, 194.

69. Perkins, *supra* note 3, at 195; Rein Mullerson, *Intervention by Invitation*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, *supra* note 30, at 127; see also *Declaration on Friendly Relations*, *supra* note 31, at 122, which states that every State has the duty to refrain from any forcible action which deprives peoples of the right to self-determination, freedom, and independence.

70. Schachter, *General Course*, *supra* note 58, at 160. Nonintervention would be in keeping with political independence because outside support would be contrary to the right of the people

Consequently, most would agree that when an insurgency occurs on a large scale, neither side should receive outside assistance because it violates the political independence of the State.⁷¹ If, however, a conflict does not rise to the level of widespread civil war, there is greater disagreement.⁷²

The heart of the problem with regard to outside intervention in support of an incumbent government against a popular uprising is the substantial threat to the right of self-determination,⁷³ and the political independence

to decide the issue for themselves. *Id.* Thus, although governments may generally have the right to give and receive military assistance, such support may be impermissible in these circumstances. Mullerson, *supra* note 69, at 132-33; John L. Hargrove, *Intervention by Invitation and the Politics of the New World Order*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, *supra* note 30, at 113.

71. See Schachter, *General Course*, *supra* note 58, at 160. "Large scale" would mean it involves a substantial number of people or control of significant areas of the country by opposing forces. States do not challenge this principle; rather, they rely upon the doctrine of counterintervention — that is, one side has already received outside support — to justify intervention to assist the other side. *Id.*; Mullerson, *supra* note 69, at 127-34.

72. Governments continue to defend the legality of assistance to other governments, and there is no clear prohibition against it. For instance, in response to its invasion of Grenada, the United States declared that the lawful government of a State may invite outside military assistance to deal with internal disorders as well as external threats. Mullerson, *supra* note 69, at 132. Moreover, many Western scholars might agree that international law does not forbid rendering military assistance at the request of the legitimate government with the aim of restoring internal disorder. *Id.* Professor Schachter cautions, however, that in these circumstances, there should be a heavy burden on the intervening government to demonstrate that its use of force has not infringed upon the right of the people to determine their political system and their government. Schachter, *General Course*, *supra* note 58, at 160. On the other hand, the Institut de Droit International declared in 1975 that States should refrain from giving assistance to all parties in a civil war in another State. Mullerson, *supra* note 69, at 132. The *Declaration on the Inadmissibility of Intervention* also declares that States should not interfere in situations of civil strife in other States. *Declaration on Inadmissibility of Intervention*, *supra* note 1. The *Declaration on Friendly Relations* is not clear. While it declares that States are not forcibly to intervene to deprive dependent peoples from exercising their right to self-determination, it appears to permit intervention to assist those peoples in certain circumstances. On the other hand, States are to refrain from organizing, instigating, assisting, or participating in acts of civil strife or terrorist acts in another State. *Declaration on Friendly Relations*, *supra* note 31.

73. See U.N. CHARTER art. 1, ¶¶ 2, arts. 55, 56; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, ¶ 1, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, ¶ 1, 999 U.N.T.S. 171. There is some controversy about the content of the right to self-determination outside of the colonial context, where it is generally accepted. Once peoples are free from colonial domination, there is debate as to whether self-determination extends to secession from an independent State. The opposing principle, of course, is territorial sovereignty and the *Declaration on Friendly Relations* illustrates this tension. Because many claims to secession are emerging and, given that the artificiality of many colonial and other political boundaries will probably continue to surface, these principles are being explored anew. See generally Deborah Cass, *Re-thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287 (1991).

of the embattled State.⁷⁴ If foreign military intervention restricts the political independence of the country, or limits the populace's choice as to the composition or policies of its government, such force is probably impermissible.⁷⁵ It is unclear, however, when intervention causes these effects.

B. Domestic Jurisdiction Generally in U.N. Practice

Although the principles governing unilateral State intervention in internal conflicts appear to be moving towards nonintervention,⁷⁶ the opposite may be true for U.N. intervention. While the Organization has generally regarded internal power struggles as domestic matters, it has intervened when these conflicts have had international effects. Even when the United Nations has intervened, however, it has had different goals and utilized different methods than unilateral intervenors. It has tried not to violate principles such as self-determination, political independence, and territorial sovereignty.⁷⁷

Jurisdiction in internal conflicts also raises important questions peculiar to the U.N. Charter, which directly addresses the question of domestic jurisdiction. The Organization's duty to refrain from intervening in matters within the domestic jurisdiction of its members is set out in article 2(7):

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this

74. Assuming there is no outside support for the rebellion, the very necessity of a government's appeal to a foreign State for military assistance places the legitimacy and continuing viability of that government in doubt. Mullerson, *supra* note 69, at 132.

75. Perkins, *supra* note 3, at 183-89. Perkins provides cogent arguments regarding the permissibility of intervention to assist either side, and arguments in support of the erosion of the traditional rule favoring intervention to assist the constitutional power. Given the principles of sovereignty, political independence, and self-determination, it is difficult to discern how it is permissible for foreign forces to decide who will prevail in an internal struggle for power. *Id.* The fact that interventions are defended as counterinterventions, or as assistance with internal disorders versus widespread revolt, indicates that the tilt is towards nonintervention in most cases. Moreover, many questions have been raised as to the legitimacy of the government which is requesting intervention or the actual existence of an invitation to intervene in particular cases. See Hargrove, *supra* note 70, at 113.

76. With the end of the Cold War, and the emergence of the United Nations as a more effective force, unilateral intervention is likely to decrease. This will hasten the progression towards a principle of unilateral nonintervention which may be conditioned, however, on an adequate U.N. option. With the end of the Cold War, the theory of counterintervention is likely to become largely irrelevant since counterintervention was primarily a theoretical construct to explain the legality or illegality of superpower intervention in internal conflicts.

77. These principles are prescribed in the U.N. Charter. U.N. CHARTER ch. I.

principle shall not prejudice the application of enforcement measures under Chapter VII.⁷⁸

This clause symbolizes a source of constant tension between the Organization and its members: the extent to which State sovereignty is relinquished by joining this international body.⁷⁹ Consequently, article 2(7) regulates the relationship between the United Nations and its members⁸⁰ by prohibiting the Organization from going beyond vaguely-prescribed boundaries.⁸¹

The exact limits of those boundaries are incapable of precise and permanent definition, however, because domestic jurisdiction is determined by the development of international relations, which is dynamic.⁸² Whether a particular matter is domestic or international depends upon an assessment of the current state of international relations,⁸³ which can turn upon

78. *Id.* art. 2, ¶ 7. This clause was intended to characterize the areas of inter-State life directly regulated by international law, and to identify the range of competence possessed by the Organization, which only possessed such powers as were attributed to it by the terms of the Charter. Lawrence Preuss, *Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction*, 74 R.C.A.D.I. 553, 556 (1949).

79. By joining an international organization, which is a voluntary act of sovereignty, a State assumes various obligations which are derived from the scope and character of the organization. In assuming these obligations, the State transfers certain elements of its jurisdiction and certain prerogatives of its sovereignty to the organization. Thus, simply by joining, a State assents to limitations upon its sovereignty to the extent required to enable the organization to carry out its functions and achieve its aims. DJURA NINCIC, *THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS* 26 (1970).

80. Doc. 1019, I/1/42, 6 U.N.C.I.O. Docs. 507-08 (1945).

81. When drafting the U.N. Charter, the major powers did not want to be restrained in the peace and security arena, but did want to prohibit the Organization from interfering in domestic matters. This was especially pertinent because the United Nations would be dealing with topics not previously regulated by international organizations. Accordingly, article 2(7) is included as a general principle and made applicable to the activities of the entire Organization, rather than being limited to the peaceful settlement mechanisms, as originally proposed and as was the case in the League of Nations Covenant. RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER* 900 (1958). Member States had to be assured that the Organization's interest in the economic, social, and cultural spheres would not deprive them of control over their affairs, and that the Organization would deal with governments rather than directly intervene in their internal affairs. Preuss, *supra* note 78, at 578.

82. *Nationality Decrees Advisory Opinion*, 1923 P.C.I.J. (Ser. B) No. 4, at 156. In deciding whether certain nationality decrees issued in Tunis and Morocco were "solely within the domestic jurisdiction" of France, thereby depriving the League of Nations of jurisdiction over the matter, the Court found that whether a certain matter is, or is not, solely within the domestic jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.

83. Howell, *supra* note 56, at 91. For instance, human rights were within the domestic jurisdiction of States when the Charter was written in 1945. Since that time, they have passed into the international sphere. Higgins, *supra* note 56, at 26, 31. It should be noted that human rights provisions were included in the Charter, thereby indicating some intention to include them within international jurisdiction. Nonetheless, States considered them largely domestic matters and it is unlikely that States anticipated direct intervention into the affairs of Member States to enforce these rights. Although there currently is debate over whether force can be utilized

political⁸⁴ or legal criteria.⁸⁵ U.N. practice has favored a political yardstick,⁸⁶ and over the past fifty years, the trend has inexorably been towards enlarging the subject matter considered by the Organization.⁸⁷

Deciding whether or not a particular matter is domestic is a political decision made by political organs, such as the General Assembly and the Security Council.⁸⁸ Nevertheless, these decisions are subject to some

to protect human rights, it is generally acknowledged that the manner in which States treat their citizens is no longer a wholly domestic concern.

84. Howell, *supra* note 56, at 92–93. Political criteria, which would include such theories as international concern, discussed *infra* at part I.C.1, are generally more subjective than legal standards which are considered to be relatively more objective.

85. Legal criteria would include whether a matter is governed by treaty or by customary international law. Howell, *supra* note 56, at 95. The *Nationality Decrees Advisory Opinion* is one example. Although nationality issues are generally domestic, a number of treaties governing the relationship between France, Britain, Tunis, and Morocco indicated that the matter was no longer solely within the domestic jurisdiction of France. *Nationality Decrees Advisory Opinion*, 1923 P.C.I.J. (Ser. B), No. 4, at 158–62. Any question can be the subject of a treaty, thereby invalidating a claim of domestic jurisdiction. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 63–64 (1963). Moreover, even utilizing this more objective criteria, it is difficult to argue that there are fixed topics which are perpetually within the domestic jurisdiction of States. *Id.* Attempts have been made to draw up a list of topics that are currently within the reserved domain, but a characterization as domestic or international depends on the precise facts and legal situation at hand as the *Nationality Decrees Advisory Opinion* illustrates. See BROWNLIE, *supra* note 1, at 291. The suggestion that where no formal international obligations exist on a topic it automatically falls within domestic jurisdiction has been rejected; there may be claims based on customary international law or the matter may have international repercussions. Howell, *supra* note 56, at 95. During the interwar years, the objective definition of domestic jurisdiction dominated, although international repercussions could remove a matter from domestic jurisdiction. *Id.*

86. International law was rejected as the standard for making these determinations because the major powers argued that international law was subject to constant change and would thus make it difficult to define whether or not a given situation came within the domestic jurisdiction of a State. Moreover, this body of law was indefinite and inadequate, and to the extent it was dealt with, the concepts were antiquated and should not have been frozen into the Charter of the new Organization. Many delegations rejected these views and thought eliminating a legal standard was a step backwards because the Organization would be substituting a political opinion for a juridical decision. RUSSELL, *supra* note 81, at 900–10; Commentators have also questioned the rejection of a legal standard. See, e.g., Higgins, *supra* note 56, at 31; Howell, *supra* note 56, at 97–99.

87. MANNARASWARNIGHALA S. RAJAN, *THE EXPANDING JURISDICTION OF THE UNITED NATIONS* 168 (1982). Initial apprehensions that the domestic jurisdiction clause would impede the work of the United Nations have proved to be incorrect. Instead, the Organization's jurisdiction has been far reaching and continually expanding. There are few topics of international concern or interest that U.N. organs have not dealt with in some manner, despite their impact or origin in the domestic jurisdiction of States. Rajan asserts that matters of international concern and interest are not treated by U.N. organs as a limited identifiable quantity, but as a perennially open category into which subjects can be included or excluded at any time at the discretion of U.N. organs, whether such topics were traditionally domestic or are wholly new subjects. For a full discussion, see *id.* at 168–75.

88. Deleting a legal standard and omitting who should decide, are correlated; it moved the determination from the juridical to the political realm. CLAUDE, *supra* note 9, at 182–83. The major powers did not want to prescribe a method to apply the domestic jurisdiction clause,

normative constraints.⁸⁹ Despite their political nature, legal standards⁹⁰ are taken into account, along with the acute awareness that precedent is inevitably being made.⁹¹ Consequently, while domestic jurisdiction has become increasingly ineffective as a barrier to U.N. consideration of an issue,⁹² resolutions are generally ineffectual when addressed to a matter an affected State believes is within its domestic jurisdiction.⁹³ This indicates that States still perceive some dichotomy between domestic and international jurisdiction.

Views on what acts actually constitute intervention have varied between two extremes. Some have defined intervention broadly as: consideration of any kind, which would include placing an item on an agenda; discussion; forming a commission of inquiry or any kind of

arguing that such determinations should be made by the organ involved, on a case by case basis, just as in other matters of Charter interpretation. A number of delegations, however, considered it critical to include who would decide. Some States thought this configuration would vest the Security Council, a political body, with a juridical function while not binding it to a legal standard. The major powers adamantly adhered to the principle of coequality of coordinate organs, however, and refused to confer upon the International Court of Justice a power resembling judicial review that is found in the U.S. system of government, although an advisory opinion could always be obtained to assist in determinations of disputed competence. Preuss, *supra* note 78, at 594-97. The *travaux* also indicate that the decision was to be made by the Organization and this has been the practice.

89. Oscar Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 R.C.A.D.I. 165, 173 (1963) [hereinafter Schachter, *Law & Politics*]. The objectives pursued are generally believed to fall within the parameters laid out in the Charter and related constitutional practice. Decisions are reached within the framework of a fairly well-defined system, where the participants employ the common vocabulary of the Charter and utilize Charter principles and purposes to justify their positions and conduct. *Id.* While governments do sometimes ignore what is legally required, conceptions of what is legal and appropriate play a significant role in shaping both the proceedings and the outcome. States generally believe what they do is required by law, whether it is the law of the Charter, of international conventions, customary law, or general principles accepted as law. *Id.* at 174; cf. CLAUDE, *supra* note 9, at 171. Claude stresses the self-interest of States in approaching these matters and the twisting of precedent to achieve their objectives.

90. HIGGINS, *supra* note 85, at 48. These legal rules include specific treaty-based rules based on consent to the Charter and general international law. In the course of its work, the Security Council interprets its constitution, which in addition to being an international treaty, also contains many accepted concepts of international law. Such usage and precedent may develop into legal rules — norms which are accepted as binding by the vast majority of States and by organs of the United Nations. *Id.*

91. See Schachter, *Law and Politics*, *supra* note 89, at 174.

92. RIGGS & PLANO, *supra* note 21, at 25. The United Nations has tended to view matters covered by treaties or referred to in the Charter, such as human rights or self-determination, as no longer within the reserved domain. 2 LEO GROSS, *ESSAYS ON INTERNATIONAL LAW & ORGANIZATION* 1173 (1984). Nevertheless, many U.N. measures on these subjects have been general in nature and not directed against a particular State in a particular situation. Thus, their implementation depended on the voluntary cooperation of Members. RIGGS & PLANO, *supra* note 21, at 241-42. This indicates that there are limitations because general resolutions, which are not directed to a particular State, are not considered interventions.

93. RIGGS & PLANO, *supra* note 21, at 25 (citing the ineffectiveness of the long string of resolutions on South Africa); cf. Luard, *supra* note 6, at 162.

investigation;⁹⁴ or issuing a procedural or substantive recommendation.⁹⁵ At the other extreme, others have limited the definition of intervention to "dictatorial intervention," a preemptory demand accompanied by enforcement, or the threat of enforcement, if there is noncompliance. Any action falling short of this is therefore permissible.⁹⁶

Neither of these extremes has been accepted in practice. Rather, a resolution addressed to a particular State is viewed as intervention, requiring a determination of whether it concerns a matter within the affected State's domestic jurisdiction.⁹⁷ Moreover, measures based on the consent of the parties are not viewed as intervention.⁹⁸ Mandatory measures, or the introduction of any forces for any purpose into the territory of a State, would undoubtedly amount to intervention.⁹⁹ Nevertheless, in the case of recommendatory measures, consent would make such intervention permissible.¹⁰⁰

94. For instance, some States argued that investigation of the Greek situation in 1948 was intervention in the internal affairs of Greece. HIGGINS, *supra* note 85, at 70.

95. The most acute area of concern has been recommendations and resolutions, which are the limits of the powers of the General Assembly. U.N. CHARTER ch. IV. If both are construed as intervention, the authority of this organ would be greatly circumscribed. If placing an item on an agenda is intervention, any item which a State objects to as within its domestic jurisdiction, would be removed from the General Assembly's purview. Since the bodies of the Organization determine their own jurisdiction, discussion by a U.N. organ of an internal matter or merely placing it on the agenda of an organ is not considered intervention. Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 421.

96. HIGGINS, *supra* note 85, at 68. Adherents to this view favor a restricted interpretation of intervention to promote the effectiveness of the United Nations. Because the General Assembly has no such dictatorial powers, no act by this body could be intervention. Gross, *supra* note 92, at 1187. Since only the Security Council can order enforcement measures, in which case the sole exception to article 2(7) applies, this interpretation renders the article 2(7) prohibition a nullity.

97. Passing a resolution directed at a particular State may not seem to be intervention in any meaningful sense. If, however, a succession of resolutions are passed and a committee is set up to mobilize and exert pressure by every means available, a form of intervention does take place. These actions are clearly designed to influence events within the State. Luard, *supra* note 6, at 162. *But see* RIGGS & PLANO, *supra* note 21, at 25. Adoption by a U.N. organ of a resolution addressed to all members or all States is not considered intervention. Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 421.

98. Murphy, *supra* note 58. Consent does not legitimize intervention, however, if intervention violates a Charter prohibition. The Organization may be precluded from undertaking certain actions under its own constitutional law regardless of an individual State's consent. Szasz, *supra* note 18, at 353-54.

99. Szasz, *supra* note 18, at 353; *see also* HIGGINS, *supra* note 85, at 68; MURPHY, *supra* note 62, at 16; Luard, *supra* note 6, at 162.

100. In the case of mandatory measures under chapter VII, consent is not necessary. D.W. BOWETT, UNITED NATIONS FORCES 412 (1964). One of the essential characteristics of peacekeeping is that these operations are established only with the consent of the parties to the dispute. BLUE HELMETS, *supra* note 3, at 5-6. They are usually not chapter VII actions, but rather recommendatory operations under the auspices of the Security Council or the General Assembly.

C. U.N. Intervention in Internal Conflicts During the Cold War Era

1. Internal Conflicts and the Concept of International Concern

In the post-Cold War era, the trend towards international jurisdiction has escalated most decidedly with respect to internal conflicts, where the United Nations is increasingly taking an assertive role. Yet, internal power struggles have historically been considered domestic matters by U.N. organs, except to the extent that they have had international effects. International jurisdiction, almost from the Organization's inception, has been formulated as part of the broad concept of international concern,¹⁰¹ which has greatly expanded the jurisdiction of the Organization. Domestic jurisdiction claims have continued to be asserted by States.¹⁰² Yet contrary to what article 2(7) would appear to provide,¹⁰³ international relations in the post World War II era have been at a point where something less than a "threat" or "breach" of the peace permits the Organization to exercise jurisdiction.

Professor Szasz, former legal counsel to the United Nations, has enunciated various factors that, alone or in combination, might internationalize internal hostilities, and make them matters of international

101. HIGGINS, *supra* note 85, at 77. The development of this concept is linked to chapter VI, where the Security Council can make recommendations regarding matters which are likely to endanger international peace. As originally formulated, article 2(7) could defeat jurisdictional claims by the Organization under chapter VI. It was only when the Organization was exercising its enforcement powers, under chapter VII, that article 2(7) was preempted. Yet, beginning in 1946, with consideration of the situation presented by the Franco regime in Spain, the Organization has relied upon the concept of international concern which has encompassed situations broader than enforcement or even a breach or "threat" to the peace to defeat domestic jurisdiction claims. Of course, international concern is open-ended and has been continually expanded. It is often relied upon, however, as a subsidiary basis of jurisdiction in this expanded form. Some have enlarged the concept to cover matters of importance or great international importance — which is an inherently subjective standard. Others have found that matters cannot be domestic because they are being considered by a large number of States. *Id.* at 77–81. Professors McDougal and Reisman have asserted that any matter originating in one State with deprivatory effects beyond its borders may be of international concern. Myers S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, 15 (1968).

102. See generally GROSS, *supra* note 92. While claims of domestic jurisdiction have often been defeated, article 2(7) has influenced how U.N. jurisdiction has been exercised. See *id.* 1173.

103. RUSSELL, *supra* note 81, at 900–03. It was after some debate that the exception in article 2(7) was specifically confined to enforcement measures, which include nonmilitary measures under article 41 and military measures under article 42. The *travaux préparatoires* indicate that article 2(7) was to remain fully applicable to recommendations under both chapters VI and VII. The express aim was to prohibit specific recommendations from the Security Council, settling disputes arising from matters within the domestic jurisdiction of individual States, even when the situation had so degenerated that there was an actual threat to, or breach of, the peace. Preuss, *supra* note 78, at 587.

concern.¹⁰⁴ They are: (1) major acts of international outrage during the course of the conflict¹⁰⁵ or significant violations of human rights;¹⁰⁶ (2) disputes of a considerable size, intensity, and length;¹⁰⁷ (3) the likelihood of intervention by outside States assisting either the government in power, the insurgents, or groups of countries assisting both sides;¹⁰⁸ (4) actual or

104. Szasz, *supra* note 18, at 347-51. While any single factor might render a conflict international, the greater the number of factors present in a given situation, the higher the political pressure to find it a matter of international concern. Myers, *supra* note 4, at 74-75. Professor Schachter has identified five categories of disputes which are of sufficient international concern to warrant some degree of U.N. action: (1) internal conflicts involving charges of external aggression or subversion; (2) conflicts characterized by a breakdown in law and order with the resulting danger of external intervention; (3) anticolonial conflicts; (4) conflicts arising from racism; and (5) internal strife involving massive suffering of noncombatants. Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 409-10.

105. For instance, the Security Council found that the 1960 Sharpeville massacre in South Africa led to international friction which, if it continued, "might endanger international peace and security." Myers, *supra* note 4, at 98 (quoting S.C. Res. 134, U.N. SCOR, 15th sess., 856th mtg. at 1, U.N. Doc. S/INF/Rev.1 (1960)); Rita F. Taubenfeld & Howard J. Taubenfeld, *Southern Africa in Brief*, in RACE, PEACE, LAW, AND SOUTHERN AFRICA 28 (John Carey ed., 1968).

106. The General Assembly and the Security Council have passed numerous resolutions on South Africa's racial policy of Apartheid. Goler T. Butcher, *The Unique Nature of Sanctions Against South Africa and Resulting Enforcement Issues*, 19 N.Y.U. J. INT'L L. & POL. 821, 826-28 (1987). South Africa has consistently maintained that because of article 2(7), the Organization does not have the right to even discuss the matter. Taubenfeld & Taubenfeld, *supra* note 105, at 27. A series of chapter VI nonmandatory embargoes were imposed. Finally, in 1977, the Security Council found that the policies and acts of the Republic of South Africa to protect its Apartheid system, including violence against the indigenous black population, were fraught with danger to international peace and security. Resolution 418 imposed a mandatory arms embargo, under chapter VII. Butcher, *supra* at 829; Henry J. Richardson, III, *Constitutive Questions in the Negotiations for Namibian Independence*, 78 AM. J. INT'L L. 76, 83 (1984).

The 1965 unilateral declaration of independence in Southern Rhodesia, wherein the white minority denied the black majority any participation in the political process, was found to be a threat to international peace. S.C. Res. 232, *supra* note 43. While members referred to chapter VII and interstate conflict, the international concern appeared to actually stem from gross violations of human rights by the Smith regime. WHITE, *supra* note 37, at 42. There was also the possibility that internal violence would spread and become international violence. White believes the spill-over effect may be exaggerated in situations where there are significant violations of human rights. *Id.* Human rights violations alone, however, even on a mass scale have never been sufficient to provoke the Security Council to undertake armed intervention. Myers, *supra* note 4, at 103. While the United States and its allies relied on Resolution 688 when it took military action against Iraq, it is highly questionable whether the Resolution authorized such action. See *infra* part I.D.2.a. Somalia, however, may be an exception or the basis for a new rule. See *supra* note 33 and accompanying text.

107. Professor Szasz notes that small riots in a limited area and of limited duration could not justify outside intervention. Major and continuous disorders, however, by their volume and direction may be of international concern. He cites the disorders in Poland during the early 1980s as an example. Szasz, *supra* note 18, at 347. Other large-scale disorders remained domestic because they did not invite outside intervention. *Id.*

108. See also William Chip, *A United Nations Role in Ending Civil War*, 19 COLUM. J. TRANSNAT'L L. 15 (1981). Chip advocates a role for the United Nations when there is a possibility of outside intervention. Cyprus is an example of an internal conflict likely to invite outside intervention by other States because of its Greek and Turkish populations and historical disputes between Turkey and Greece over Cyprus and other issues. BOWETT, *supra* note 100,

potential spill-over across international borders;¹⁰⁹ (5) classification as a colonial conflict;¹¹⁰ and (6) subjection of some parts of the dispute to international agreement.¹¹¹

at 553; Myers, *supra* note 4, at 78. This outside intervention came to fruition in 1974 despite the presence of the U.N. Peacekeeping Forces in Cyprus (UNFICYP) since 1964. BLUE HELMETS, *supra* note 3, at 215. The Congo dispute involved intervention by Belgium, and posed the threat of intervention by the USSR and other States. See, e.g., Thomas M. Franck & John Carey, *The Role of the United Nations in the Congo - A Retrospective Perspective*, in THE LEGAL ASPECTS OF THE UNITED NATIONS ACTION IN THE CONGO (Lyman Tondel, Jr. ed., 1963); Thomas Franck, *United Nations Law in Africa: The Congo Operation As A Case Study*, 27 LAW & CONTEMP. PROBS. 632 (1962); E.M. Miller, *Legal Aspects of the United Nations Action in the Congo*, 55 AM. J. INT'L L. 1 (1961). The U.N. Observation Group in Lebanon (UNOGIL) was established in 1958 to ensure that there was no illegal influx of arms or personnel amid charges of intervention by the United Arab Republic in the rebellion in Lebanon. BLUE HELMETS, *supra* note 3, at 175. The United Nations Yemen Observation Mission (UNYOM) was established in 1963 to monitor the terms of disengagement of Saudi Arabia and Egypt from the civil war in Yemen. *Id.* at 187-90.

Of course, if unilateral intervention is requested by the government, that government will argue that it is an internal matter for a State to decide whether to request assistance and as long as no third States are unwillingly involved, the conflict is not internationalized. This is open to discussion, and certainly does not preclude the situation from being a danger or threat to the peace. If external assistance is received by the insurgents, the conflict is internationalized because foreign assistance to insurgent groups puts the assisting government in conflict with the government of the State concerned, thereby creating an inter-State conflict. Szasz, *supra* note 18, at 348.

109. The most common spill-over is refugees, although cross-border military incursions and incidents sometimes transpire. WHITE, *supra* note 37, at 110.

110. Internal rebellions and unrest in colonies were initially claimed by metropolitan powers to be matters totally within their domestic jurisdiction because overseas territories were integral parts of the metropolis. Over the years these questions were increasingly brought before the world community, despite the objection of colonial sovereigns. With the adoption by the General Assembly of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960) [hereinafter *Declaration on the Granting of Independence*], the domestic jurisdiction argument became untenable. HIGGINS, *supra* note 85, at 100-05. Colonial rebellions are now legally a matter of concern to the entire international community and their suppression a threat to peace as a matter of international law. RAJAN, *supra* note 87; see also Schachter, *U.N. & Internal Conflict*, *supra* note 4. Some commentators have suggested that reimposing trusteeships or some other form of colonialism is an appropriate method of dealing with the total breakdown of civil order and society taking place in some States. See Claudio Segre, *Colonialism May Be Worth Brining Back*, PHILA. INQUIRER, Aug. 3, 1993, at A7; Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 3. There are legal problems under the charter with this solution, however. Helman & Ratner, *supra* at 16. While the self-determination issues here may be of some relevance, the demise of colonialism makes this category of limited usefulness for our purposes.

111. The dispute between India and South Africa over the treatment of Indians in South Africa is an example. HIGGINS, *supra* note 85, at 83. In 1927 and 1932, South Africa and India entered into agreements regarding the treatment of Indians in South Africa. In 1946, India argued that the passage of additional discriminatory legislation, which led to internal protests, was an international dispute and a violation of U.N. Charter provisions barring racial discrimination. South Africa argued that article 2(7) prevented the United Nations from even discussing the issue. The General Assembly proceeded to adopt resolutions on the issue, through the 16th session when it was merged with the issue of Apartheid. Taubenfeld & Taubenfeld, *supra* note 105, at 27.

The key elements have been self-determination, human rights abuses, an impact upon neighboring States, or repercussions that present a "danger" or "threat" to the peace. "Dangers" or "threats" to the peace have usually resulted from intervention, or the potential for intervention, by other States, since each of these factors, alone or in combination, can eventually lead to international effects that trigger outside intervention.¹¹² Furthermore, while the Organization has found internal conflicts to be of international concern, they have not necessarily found them to be "threats" to the peace. Consequently, chapter VII has not usually been invoked, and the Organization has proceeded under chapter VI, which is recommendatory. Therefore, intervention has generally been at the request, or with the consent, of the affected State.

2. Components That Have Remained Domestic

When it has intervened, the United Nations has, for the most part, attempted to deal only with those aspects of the situation that made it international; other issues have remained within the domestic jurisdiction of the affected State. For example, in Lebanon and Yemen, the United Nations established observer forces to monitor whether assistance was coming from foreign States.¹¹³ In Cyprus, it kept the Greek and Turkish Cypriot communities apart to prevent foreign intervention.¹¹⁴ The United Nations has been impartial and objective; it has not tried to influence or decide the ultimate political solution.¹¹⁵ For example, in Lebanon, Yemen, and Cyprus, it refused to take sides or dictate the outcome, adhering to the general principle that the ultimate political solution is a domestic matter for the people, not the United Nations, to decide. With respect to severe human rights violations based on race,¹¹⁶ however, the Organization has taken sides.¹¹⁷

112. While there was little likelihood of outside States actually intervening in Southern Rhodesia and South Africa, the ensuing protracted war against these regimes and the resulting spill-over into other countries had acute international effects. Scheffer, *supra* note 29, at 286.

113. BLUE HELMETS, *supra* note 3, at 175, 187.

114. *Id.*

115. *Id.*; Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 414.

116. The human rights violations that the Organization has addressed most often are Apartheid in South Africa and treatment of the black majority in Southern Rhodesia. Apartheid has been found to be an international crime against humanity and thus is not considered an internal matter. Butcher, *supra* note 106, at 822-23; International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, U.N. GAOR, 28th Sess., Annex, Agenda Item 53, at 11, 15, U.N. Doc. A/9233/ADD.1 (1973).

117. The Organization has taken sides in the case of severe human rights violations involving racial discrimination and in the case of colonial conflicts. Racially discriminatory policies have been strongly condemned, resolutions have demanded basic changes, and demands

These principles raise acute difficulties when the Organization is involved in an ongoing conflict, because in these circumstances, almost any action favors one side or the other, as the U.N. peacekeeping mission in the Congo (now Zaire) demonstrated.¹¹⁸ In 1961, an ill-prepared Congo was granted independence and soon thereafter, allegedly in response to major internal disorders, Belgian forces intervened. The Congo requested assistance to expel these forces.¹¹⁹ The Security Council immediately, and in subsequent resolutions, called for withdrawal of all foreign forces¹²⁰ and the restoration of law and order, which was one of the factors that precipitated Belgian intervention.¹²¹ Because these measures were directed at eliminating external Belgian forces, they were largely uncontroversial. Moreover, because the United Nations intervened at the request of the Congo, its presence on Congolese territory was with the Congo's consent. Thus, its presence did not raise article 2(7) concerns.¹²²

have been asserted as obligations on the basis of the U.N. Charter. Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 413.

118. The Congo is a classic case of internal strife that sparks intervention by foreign forces, threatens further intervention by additional States, and possesses all of the earmarks of an internal situation which could spark a major international conflagration. Not only had Belgian troops intervened in response to the internal crisis, but additional unilateral intervention was threatened. Miller, *supra* note 108, at 14; Franck, *supra* note 108, at 633. The U.N. role in this particular conflict must not be taken out of context, however. The resolutions were often vague and the Secretary General was given a great deal of discretion because of the lack of true consensus on the Security Council. Moreover, these actions were taken in a true crisis atmosphere. Miller, *supra* note 108 at 14-15.

119. The United States was approached first and refused, referring the government to the United Nations. The central government then brought its case to the United Nations. On July 11, 1960, the President and Prime Minister of the Republic of the Congo requested urgent military assistance from the United Nations. This request was based upon the presence of Belgian troops contrary to the wishes of the government of the Congo, and thus in violation of a treaty of friendship between the two countries. This unsolicited Belgian intervention was viewed as an act of aggression by Congolese authorities. Franck & Carey, *supra* note 108, at 13.

120. The Security Council passed its first resolution in the crisis two days after the Congo's request. This resolution gave the Secretary General the authority to provide the government of the Congo with such military assistance as may be necessary. U.N. SCOR, 15th Sess., 873d mtg. at 1, U.N. Doc. S/4387 (1960). This led to the establishment of the *Operation des Nations Unies au Congo* (ONUC). This force remained in the Congo from July 1960 until June 1964. BLUE HELMETS, *supra* note 3, at 215.

121. U.N. SCOR, 15th Sess., 879th mtg., U.N. Doc. S/4405 (1960), states that the complete restoration of law and order in the Republic of the Congo would effectively contribute to the maintenance of international peace and security. Because the Belgian intervention had supposedly been due to the breakdown of internal law and order, it followed that the maintenance of internal law and order was a necessary precondition to Belgian withdrawal and thus to the successful accomplishment of the maintenance of international peace and security. BOWETT, *supra* note 100, at 186-87.

122. Of course, if there is a threat to the peace and the Security Council is undertaking enforcement or any action under chapter VII, consent is not required. See BOWETT, *supra* note 100, at 412-13. In the Congo, the United Nations at a number of points began to operate in a manner contrary to the wishes of the Congolese government. Franck, *supra* note 108, at 638-43.

What did provoke debate was the Organization's role in the ensuing constitutional crisis and the attempted secession of the province of Katanga. Because the U.N. intervention was not an enforcement action,¹²³ article 2(7) continued to apply,¹²⁴ and the Secretary General thus continually maintained that the Organization would not interfere in the dispute between competing governmental factions, an entirely internal affair. Yet a number of U.N. actions led to charges of assisting a particular side and influencing the outcome of the constitutional crisis.¹²⁵ There were also efforts by competing factions to use the United Nations to advance their goals.¹²⁶ Eventually, the General Assembly and the Security Council authorized the use of force to end the civil war,¹²⁷ and prevented the secession of Katanga by military force.¹²⁸ Many argued that this secession was not an exercise in self-determination, however, but was inspired by foreign forces.¹²⁹ If nothing else, the U.N. experience in the Congo demonstrates the almost impossible task of remaining neutral in an ongoing war, despite the best of intentions. It also indicates that the

A number of commentators concluded that because this was also a chapter VII action, the United Nations intervened as of right and controlled ONUC's operations and its demise. *Id.* at 642-43; Miller, *supra* note 108, at 1; BOWETT, *supra* note 100, at 421-22; cf. HIGGINS, *supra* note 85, at 64 (noting that "Article 2(7) is an overriding provision, to which all Charter articles are subject, save for express exceptions."). Yet in practice, until recently, the United Nations has obtained the consent of the host State in peacekeeping operations, and it is unlikely it would have intervened had the Congo not issued an invitation. Franck, *supra* note 108, at 643.

123. While the resolutions do not specify the articles of the Charter the Council relied on, a number of commentators have persuasively advanced that the Council was probably proceeding under article 40, which authorizes provisional measures to prevent the aggravation of a situation. Miller, *supra* note 108, at 4-5; Franck, *U.N. Law in Africa*, *supra* note 108, at 644; HIGGINS, *supra* note 85, at 88-89, 235-37; BOWETT, *supra* note 100, at 288; Chip, *supra* note 108, at 15. In an advisory opinion, the International Court of Justice found that the operation did not involve preventive or enforcement measures against any State under chapter VII, which suggests the Court did not consider articles 41 and 42 germane. Advisory Opinion, *Certain Expenses of the United Nations*, 1962 I.C.J. 151 (July 20).

124. The Secretary General consistently maintained that article 2(7) continued to apply. Even when a later resolution invoked articles 25 and 49, it included an express statement that the U.N. force in the Congo would not be a party to, or in any way intervene in, or be used to influence the outcome of, any internal conflict, constitutional, or otherwise. U.N. SCOR, 15th Sess., 886th mtg. at 2, U.N. Doc. S/4426 (1960). Again, a reference to domestic jurisdiction.

125. These charges were made most vociferously when the United Nations closed airfields to all non-U.N. traffic and shut down a radio station in early September 1960. These measures appeared to favor the forces acting against Lumumba. Franck & Carey, *supra* note 108, at 21-22.

126. See generally Miller, *supra* note 108, at 15-20; Franck, *supra* note 108, at 644-52.

127. U.N. SCOR, 16th Sess., 942d mtg. at 147, U.N. Doc. S/4741 (1961) [hereinafter S/4741]. The Security Council authorized the United Nations to use force if necessary as a last resort to prevent the occurrence of civil war and to bring about the halting of all military operations.

128. Franck & Carey, *supra* note 108, at 34-43.

129. Miller, *supra* note 108, at 17 (describing views expressed in the Security Council); Franck, *supra* note 108, at 632.

mandate on this matter must be clear. Recent events indicate that the United Nations is moving away from the principle of neutrality. Unfortunately, the end result may be to bog down the Organization in what are sometimes intractable conflicts that it is not adept at resolving.¹³⁰

D. Domestic Jurisdiction in Internal Conflicts: The Current International Environment

1. Broader International Jurisdiction

In the current international milieu, when the elements enumerated by Szasz are applied, they are likely to make many more internal conflicts of international concern. Outside support may result from ethnic or religious affinities, as the case of the former Yugoslav Republics illustrates.¹³¹ The actual or potential spill-over into other States can have profound effects upon regional stability, given ethnic and religious bonds, as the flight of Iraqi Kurds to neighboring countries with large restless Kurdish populations indicates.¹³² There is also less tolerance for human rights abuses, which the situation in Somalia and the international response to it illustrate.¹³³

With the collapse of the Cold War world order, which was characterized by superpower rivalry and a balance of power, there is a great deal of uncertainty, and a larger degree of instability. The post-Cold War era is characterized by the reemergence of buried nationalism and claims to secede, rising political demands within countries and revolts against long-time dictators, protracted internal conflicts (some left-over from the Cold War), and instability in numerous nascent democracies. These conditions may increase the likelihood of a particular internal conflict having a regional or international impact.

Consequently, based on the previous factors that internationalized internal conflicts, current sensibilities and the contemporary international

130. An example is Somalia, which is discussed in detail *infra* part I.D.2.b.

131. Serbs from Serbia and Croats from Croatia have been assisting their Bosnian brethren in carving out independent Serb and Croat republics in Bosnia-Herzegovina. The governments of Croatia and Serbia, as well as the Croat and Serbian Bosnians, would like these independent States to be affiliated with or part of Croatia and Serbia. Muslim nations have vowed to assist Muslims in Bosnia. Claude van England, *Islamic States' Concern for Bosnia*, CHRISTIAN SCI. MONITOR, Nov. 3, 1992, at 6; Hugh Pope, *Turks Call for Weapons from Islamic Nations*, INDEPENDENT (London), June 12, 1993, at 8; *Iran Offers Help to Bosnian Muslims*, CHRISTIAN SCI. MONITOR, Nov. 6, 1992, at 2; see also Cass, *supra* note 73, at 33-36, 38-39 (discussing the growing number of claims to secede).

132. See *infra* part I.D.2.a.

133. See *infra* part I.D.2.b. Of course, the failure to respond to a similar crisis in Bosnia makes this assertion somewhat tenuous.

environment would indicate a role for the United Nations in a greater number of internal conflicts. This is borne out in practice as the Organization undertakes to resolve and assist in many contemporary internal conflicts.¹³⁴

Furthermore, the Security Council is carving out new grounds for international concern and jurisdiction. Failure to allow the delivery of humanitarian assistance has become an international matter that permits intervention without State consent.¹³⁵ Some contemporary conflicts may attract no outside assistance for either side; the country may disintegrate as in Somalia.¹³⁶ In these cases, it is more likely, although not certain, that profound humanitarian or human rights abuses may result. Therefore, the Council has asserted jurisdiction. This decision shifts additional internal conflicts into the international sphere because the resulting humanitarian crises, in and of themselves, with no threat of unilateral intervention, appear to have given the Council mandatory jurisdiction.¹³⁷ It also indicates that international concern in internal conflicts can arise from human rights violations that do not involve racial discrimination or colonialism.¹³⁸

The case of Haiti raises questions about the proper role of the Organization in these matters because the Security Council decided which faction was the appropriate government and mandated settlement by demanding that a deposed leader be restored to power.¹³⁹ This is unprecedented because these issues have long been considered an internal question in previous internal conflicts, except with respect to the case of Apartheid in South Africa which has been declared a crime against humanity, a

134. This is not to discount the impact of recent and profound political changes that include the end of the Cold War and a Security Council that is working together. Still, most of these conflicts have been brought to the Organization by affected or surrounding States. This indicates that domestic jurisdiction limitations are receding as long as there is consent.

135. Somalia and Iraq are examples. See *infra* parts I.D.2.a.b.

136. There has been an outflow of refugees, however. Paul Lewis, *U.N. Will Increase Troops in Somali*, N.Y. TIMES, Mar. 27, 1993, at A3; Lucia Mouat, *U.N. to Break New Ground in Plan for Peacekeepers in Somali*, CHRISTIAN SCI. MONITOR, Mar. 16, 1993, at 2; *Out With Them*, ECONOMIST, Feb. 6, 1993, at 46. Somalia also presents the prospect of the total collapse of governmental authority.

137. This jurisdiction has been based upon a finding of a threat to the peace, which has broad implications regarding the power of the Security Council. See *infra* notes 299–304 and accompanying text.

138. Colonial questions had racial undertones, given that most colonies were in Africa and Asia, and the metropolitan powers were European. The main element here, however, was self-determination. See *Declaration on Granting Independence*, *supra* note 110. The situations in South Africa and Southern Rhodesia, partly because of the racial element, did precipitate involvement by surrounding States who let opposing forces operate on their territories, thus drawing them into the conflict.

139. S.C. Res. 841, *supra* note 27, ¶ 16, at 4.

violation of international law, and a threat to the peace.¹⁴⁰ In the case of Haiti, while there were human rights abuses, they were not the central focus of the U.N. Resolution.¹⁴¹

2. Contemporary Interventions: Case Studies

U.N. interventions in Iraq, Somalia, and Haiti, are situations that warrant special attention because they raise questions regarding the evolution of the concept of domestic jurisdiction.¹⁴² In Iraq, the Security Council intervened in an internal conflict without the consent of the affected State despite the conspicuous absence of chapter VII.¹⁴³ In Somalia, the Council intervened without the State's consent, and has effectively eliminated one party from the political process. In Haiti, it has determined which government should be in power, heretofore a distinctly domestic concern. Thus, in both Somalia and Haiti, the Organization has on some level taken sides in the conflict. These situations are all complicated by findings of "threats" to the peace. Yet Somalia and Haiti raise profound questions regarding the parameters of this term, making later actions by the Security Council more problematic.

a. Iraq

Security Council Resolution 688, which deals with Iraq's suppression of the rebellion by Iraqi Kurds in the aftermath of the Gulf conflict, is

140. Butcher, *supra* note 106, at 821-24.

141. Human rights abuses were the focus of a series of General Assembly resolutions and reports by the Secretary General. *See, e.g.*, G.A. Res. 46/7, U.N. GAOR, 46th Sess., U.N. Doc. A/RES/46/7 (1991); *Human Rights Questions: Situation of Human Rights in Haiti: Note by the Secretary-General*, U.N. GAOR, 47th Sess., Agenda Item 97(c), U.N. Doc. A/47/621 (1992); *The Situation of Democracy and Human Rights in Haiti: Report of the Secretary-General*, U.N. GAOR, 47th Sess., Agenda Item 22, U.N. Doc. A/47/908 (1992). A number of resolutions condemned the coup and stated the desire of the international community for a restoration of democracy. But human rights abuses have long been matters in the international sphere. *See generally* Scheffer, *supra* note 29. The U.N. role in the election of the democratic government, which was the subject of some debate, also may afford the Organization a special role in this particular internal matter. There is also the matter of the request by the Haitian representative to consider the matter. But if this representative does not embody the *de facto* government, it would seem this consent is doubtful. Nonetheless, international concern is different from mandating a solution.

142. While this article and this symposium issue focuses on North Africa and the Middle East, Haiti and Yugoslavia are also included in the analysis because they round-out the analysis of recent Security Council measures that touch upon the concept of domestic jurisdiction, and the actions which are permissible under the Charter in these situations.

143. The Council did, however, find a threat to the peace. While there are many previous examples of the Council proceeding under chapter VII without citing it, this is difficult to assert here given the Council's new found willingness to cite and rely on this chapter. This has especially been the case with Iraq. *See, e.g.*, IRAQ AND KUWAIT: THE HOSTILITIES AND THEIR AFTERMATH 2-6 (Marc Weller ed., 1993) (reprinting Security Council Resolutions 660, 661, 664, 666, 667, 670, 678).

instructive, as is the debate which preceded its passage. There were a number of potential reasons for U.N. intervention in the resulting situation, including: (1) a massive refugee crisis that resulted after Iraq quelled the Kurdish rebellion; (2) the refugees' ethnic identity — which could have caused severe problems for the countries they were fleeing to; (3) severe human rights violations by Iraq; and (4) the fact that the region had just experienced a major conflagration. Despite all these factors, all members of the Security Council raised article 2(7) concerns and several States asserted that it precluded Council action. The Resolution barely passed, receiving only ten votes. Clearly, in the absence of consent to intervention, domestic jurisdiction remains a viable concept to Member States when internal revolts are the subject matter. A close analysis of the situation is therefore warranted.

In the aftermath of the Persian Gulf War,¹⁴⁴ Kurdish guerrillas in Northern Iraq moved against Iraqi forces,¹⁴⁵ in an attempt to gain independence from Iraq for the Kurdish minority.¹⁴⁶ Iraqi military forces moved to quell the revolt and were successful.¹⁴⁷ The fierce military onslaught by government forces prompted large numbers of Kurds to attempt to flee Iraq for Turkey and Iran.¹⁴⁸ Scenes of "wretched starving" Kurds dying of exposure¹⁴⁹ led to worldwide anger and pressure for Security Council action.¹⁵⁰ Council Members began seeking some means of aiding the Kurds without directly intervening in the crisis.¹⁵¹ Direct

144. The Persian Gulf War began with Iraq's invasion of Kuwait on August 2, 1990. The Security Council responded immediately with Resolution 660 which demanded the immediate and unconditional withdrawal of Iraqi forces from Kuwait.

145. President Bush repeatedly called for the removal of President Hussein and encouraged a revolt against him. Tom Wicker, *In the Nation; War's Real Choices*, N.Y. TIMES, Apr. 6, 1991, at A21. A Shiite insurrection against the regime of Saddam Hussein also erupted in the Southern part of Iraq. Clifford Krauss, *U.S. Urges Turkey to Open Borders to Fleeing Kurds*, N.Y. TIMES, Apr. 5, 1991, at A1, A8; Richard W. Murphy, *How to Support Saddam's Opposition*, CHRISTIAN SCI. MONITOR, July 31, 1992, at 19.

146. The Kurds are a Turkic ethnic group without a State who have long fought for some measure of autonomy. They are spread between Turkey, Iran, Iraq, Syria, and the Soviet Union. Chris Hedges, *Kurds' Dream of Freedom Slipping Away*, N.Y. TIMES, Feb. 6, 1992, at A1, A10; Tony Caplan, *Britain Mounts Emergency Relief Aid for Fleeing Kurds*, UPI, Apr. 4, 1991, available in LEXIS, Nexis Library, UPI File; Dennis Hevesi, *Two Rights Groups Indict Iraqis for Attacks on Kurds in 80's*, N.Y. TIMES, Mar. 2, 1992, at A6.

147. Hevesi, *supra* note 146.

148. Leonard Doyle, *Crisis in the Gulf: Allies Seek New Resolution to Give Humanitarian Aid*, INDEPENDENT (London), Apr. 5, 1991, at 10.

149. Peter Jenkins, *The New World is Not This Way*, INDEPENDENT (London), Apr. 9, 1991, at 7; Caplan, *supra* note 146.

150. Doyle, *supra* note 148.

151. Resolutions were discussed that would condemn the manner in which the uprising was crushed and humanitarian aid was pledged by the United Kingdom. Caplan, *supra* note 146. The United States called on Turkey to open its borders. Krauss, *supra* note 145, at A1, A8.

intervention was ostensibly ruled out because the U.N. Charter forbids intervention in the domestic affairs of Member States.¹⁵² Others, however, urged intervention, relying on the Genocide Convention¹⁵³ which defines the repression of any ethnic or cultural grouping as a crime under international law.¹⁵⁴

The debate continued as the Security Council considered Resolution 688 which demanded that Iraq cease its repression of the Kurdish minority.¹⁵⁵ Every State referred to article 2(7) and the domestic jurisdiction or internal affairs of Iraq (as does the Resolution itself). Clearly this issue was of paramount importance to Member States, as was the awareness that an important precedent was being set. Most Council members considered Iraq's treatment of its Kurdish population an internal matter that had to be removed from Iraq's internal jurisdiction. What ultimately brought it into the international sphere was its impact on neighboring States. Although the human rights abuses were roundly deplored, they seemed to be insufficient in and of themselves to make it an international matter in the eyes of most members of the Security Council.¹⁵⁶

The two States most directly affected, Turkey and Iran, referred to the immense number of refugees crossing their borders and viewed this influx, and the potential inflow, as a threat to the security of neighboring countries and as potentially destabilizing inter-State relations in the region.¹⁵⁷ As a result, the massive movement of people took the matter out of Iraq's internal affairs¹⁵⁸ and made the Security Council action, including forceful action to secure an immediate cessation of the repression of the inhabitants in the area, proper.¹⁵⁹ Although there was massive suffering taking place in Iraq, U.N. jurisdiction to alleviate that suffering appeared to be based upon the international implications of massive refugee flows.

152. Caplan, *supra* note 146; *Germany Urges International Effort for Kurds*, UPI, Apr. 5, 1991, available in LEXIS, Nexis Library, UPI File. No doubt States also hesitated because of fears of getting involved in a quagmire.

153. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

154. The Genocide Convention does not apply to political genocide. *See id.* Iraq was arguably trying to eliminate a political force and therefore this argument may not have been entirely sound.

155. U.N. SCOR, 46th Sess., 2982d mtg. at 1-2, U.N. Doc. S/PV.2982 (1991).

156. *Id.*

157. Turkey estimated over 100,000 refugees had entered Turkey, with 600,000 moving towards its borders. *Id.* at 6-7. Iran estimated that more than 110,000 Iraqi civilians had crossed the border into Iran and up to one-half million might potentially do so. *Id.* at 12-13.

158. *Id.* at 7 (Turkey), 13-15 (Iran). Both countries mentioned respect for the territorial independence and sovereignty of Iraq, with Turkey citing article 2(7).

159. *See id.* at 7 (Turkey). Iran simply called for immediate measures. *Id.* at 13-15.

Several other countries supported this reasoning,¹⁶⁰ while another group of countries found no "threat to the peace," leaving the matter within the internal jurisdiction of Iraq under article 2(7).¹⁶¹ According to the latter group, any requisite humanitarian assistance should be rendered through other U.N. agencies.¹⁶² Several Western nations, however, placed human rights abuses closer to the center of the situation.¹⁶³

Given the impact this rebellion was having on the region, the Member States' hesitancy to intervene indicates that they continue to view internal rebellions as largely internal matters in the absence of consent. Even human rights deprivations were not enough to make this an international issue warranting intervention. Rather, it was the massive flow of refugees resulting from those violations that were germane.

Nonetheless, the ultimate passage of Resolution 688 involved the Security Council in a civil conflict without the consent of the State involved. Because consent has been the basis for jurisdiction in the absence of chapter VII enforcement measures, this is a new and important development.¹⁶⁴ It moves such findings past situations involving racial discrimination (Apartheid) or colonialism by demanding that repression of a rebellion halt, and by finding that such repression may be a "threat" to the peace. The Resolution hopes for an open dialogue to ensure that the human and political rights of all Iraqi citizens are respected. While this expresses an opinion as to the settlement of the internal power struggle, it is clearly only a "hope" rather than an actual disposition of the situation, which remains an internal matter.

Significantly, the Council also insisted on access by humanitarian agencies to all parts of Iraq, and that Iraq make available all necessary

160. Council members that made statements to this effect included, *id.* at 22 (Romania), 36 (Ecuador), 37 (Zaire), 41 (Cote d'Ivoire), 56 (Austria), 57-58 (United States), 61 (USSR), 69 (Italy). Other States included, Luxembourg, *id.* at 74-75 (Luxemburg), 78 (Denmark), 79-80 (Ireland), 82-83 (Sweden).

161. *See id.* at 31 (Zimbabwe), 27 (Yemen), 43 (Cuba), 56 (China) (should address those aspects which are international; this resolution goes beyond that and addresses internal matters).

162. *Id.* at 46-52 (Cuba).

163. *Id.* at 53 (France: "Violations of human rights such as those now being observed, become a matter of international interest when they take on such proportions that they assume the dimensions of a crime against humanity."); Human rights are not essentially domestic. *Id.* at 64-66 (U.K.). Other States expressing similar sentiments that were not members of the Council included Germany, *id.* at 71-73, Spain, *id.* at 81, and the Netherlands, *id.* at 86.

164. The Resolution found that repression of the rebellion was a threat to the peace, but did not make its decisions mandatory under chapter VII. The Resolution demanded that Iraq cease this repression as a contribution to removing the threat to international peace and security. While this Resolution was used to justify a no-fly zone over portions of Iraq, this reliance is doubtful.

facilities for their operation.¹⁶⁵ The need to render humanitarian assistance has made internal conflicts of international concern in the past.¹⁶⁶ Yet such access has always been with the approval and cooperation of the affected State; it had never been insisted upon. More importantly, this provision may have laid the foundation for the more far-reaching findings in Somalia.¹⁶⁷

Eventually, in May 1991, the Secretary General executed a memorandum of understanding with Iraq that governed the supply and distribution of humanitarian assistance. Consequently, the territorial sovereignty of Iraq was not violated in this instance.¹⁶⁸ The perceived need to obtain such an agreement may have been partly due to practical concerns¹⁶⁹ and partly due to concern over the infringement of Iraqi sovereignty.

b. Somalia

Somalia presents a case of intervention where there was no governmental authority, whether constitutional or insurgent, to consent. It also raises questions regarding humanitarian assistance as an international matter, and the U.N. role in deciding a political settlement.

Since Major General Mohammed Siad Barre¹⁷⁰ fled Mogadishu in January 1991, culminating a ten year civil war,¹⁷¹ there has been no

165. S.C. Res. 688, *supra* note 28. This finding is also significant because the situation was deemed to be a threat to the peace thereby laying the groundwork for a chapter VII finding, and the use of force if a State refuses to permit humanitarian assistance. On the other hand, it is significant that chapter VII is not relied upon here, despite its omnipresence in previous resolutions dealing with Iraq.

166. Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 401.

167. See *infra* notes 178–95, 293–95 and accompanying text.

168. U.N. SCOR, 46th Sess., U.N. Doc. S/22663 (1991).

169. It is very difficult to deliver such assistance without the cooperation of the territorial sovereign.

170. President Shermarke was killed by one of his bodyguards, and thus in October 1969, Major General Mohammad Siad Barre led the army to power. The newly-installed Supreme Revolutionary Council (SRC), named Siad Barre President and indicated that it was pursuing scientific socialism, which facilitated continued Soviet assistance.

171. To entrench his personal rule and to regain the Ogaden region in Ethiopia, Siad Barre launched the Ogaden War in 1977. It officially ended in 1978, although skirmishes and border raids continued for years afterwards. The war was a disaster for Somalia resulting in the loss of 8,000 men, an influx of about 650,000 ethnic Somali and Ethiopian Oromo refugees, and a severe drain on the economy. During the war, the USSR shifted its support to Ethiopia prompting Siad Barre to turn to the United States. In 1980, the United States obliged, agreeing to provide arms and military training, in return for military access to Somali ports and airfields in the event of a crisis. The armed forces had expanded from 5,000 troops at independence to 65,000 in 1980, and 30% of the national budget was devoted to the military.

The Ogaden War led to the rise of several organized internal opposition movements. To counter them, Siad Barre undertook increasingly repressive measures, many involving severe human rights violations. Upon judging a number of Majeerteen clan members of the military guilty of a coup attempt in 1978, Siad Barre initiated a campaign against the clan-family. Several Majeerteen colonels escaped and fled abroad where, in 1978, they formed the Somali Salvation

functioning government in Somalia.¹⁷² Various clan militias turned on one another, dividing the country into twelve zones of control, while the United Somali Congress split into two competing factions and became engaged in a full-scale civil war.¹⁷³ In the meantime, part of the North declared independence.¹⁷⁴ This state of anarchy, and the collapse of most civil institutions, made it nearly impossible to deliver food and medical supplies and other forms of humanitarian assistance, resulting in massive starvation and suffering.¹⁷⁵

The Security Council's role in Somalia began with a request from the Somali representative to the United Nations¹⁷⁶ and from several organizations to consider the situation, as well as a report from the Secretary General.¹⁷⁷ Thus, jurisdiction was initially premised upon the request and the consent of Somalia. Of course, whether this consent was effective is

Front, renamed in 1979, the Somali Salvation Democratic Front. This was the first opposition movement dedicated to overthrowing the regime by force. Siad Barre then turned on the Isaaq clan-family in the North, who were discontented because they felt inadequately represented in the Government. Isaaq dissidents in London had formed the Somali National Movement (SNM) in 1981 to topple the regime. In 1982, the SNM transferred its headquarters to Ethiopia, from which it conducted guerrilla raids against Somali territory which were met with bloody reprisals. Siad Barre then attacked the Hawiye clan-family in the central area around Mogadishu. The Hawiye had formed their own opposition movement, the United Somali Congress (USC), which received support from the SNM. The Ogaden clan had originally given Siad Barre strong support, but subsequently blamed him for Somalia's defeat in the Ogaden war; they also opposed his 1988 peace treaty and his resumption of diplomatic relations with Ethiopia. As a result many Ogaden army officers deserted and joined the Somali Patriotic Movement, an opposition group formed in 1985 and a recipient of SNM support.

Siad Barre thus progressively alienated an increasing number of clans and various opposition groups waged relatively intense warfare against the national army during his final three years in office. They gained control of extensive areas: the SNM in the Northwest, the United Somali Congress in the Center, and the Somali Patriotic Movement in the South. Fifty thousand unarmed civilians were killed in the course of Siad Barre's various reprisals against the Majeerteen, Isaaq, and Hawiye. Thousands more died of starvation due to well poisonings and cattle slaughters. Hundreds of thousands sought refuge outside the country.

Following a July 1989 demonstration in Mogadishu in which almost 450 persons were killed by government forces, leaders of various sectors of society, representing all clan-families, formed the Council for National Reconstruction and Salvation to press for political change. While the opposition groups recognized the need to hold talks amongst themselves to coordinate strategy; time did not allow mutual trust to develop. Opposition forces defeated Siad Barre's regime on January 27, 1991. After a stay in Kenya, he ultimately sought refuge in Nigeria. Said S. Samatar, *Historical Setting, in SOMALIA: A COUNTRY STUDY 3* (Helen Chapin Metz ed., 1993).

172. Jeffrey Clark, *Debacle in Somalia*, FOREIGN AFF., Winter 1992-93, at 109, 112.

173. One faction was headed by General Mohammed Farah Aidid, the other by Ali Mahdi Mohammed, a wealthy Mogadishu businessman.

174. In May 1991, the SNM proclaimed the Republic of Somaliland as an interim government, pending 1993 elections. As of 1993, it had not been recognized by any foreign government. See SOMALIA: A COUNTRY STUDY, *supra* note 171, at xxx.

175. Seth Faison, *U.N. Head Proposes Expanded Efforts for Somali Relief*, N.Y. TIMES, July 25, 1992, at A1, A8; *Time to Interfere*, FIN. TIMES (London), July 29, 1992, at 16.

176. U.N. SCOR, 47th Sess., U.N. Doc. S/23445 (1992).

177. *The Situation in Somalia: Report of the Secretary-General*, U.N. SCOR, 47th Sess., U.N. Docs. S/23693 and S/23693/Corr. 1 (1992).

questionable, given the breakdown in civil authority in Somalia and questions as to whether there was any government at all to give consent. The Council responded by urging a cessation of hostilities, calling for coordination and cooperation in developing humanitarian assistance, and imposing an arms embargo under chapter VII.¹⁷⁸ What made this conflict international is unclear, but several Council members noted the request by Somalia,¹⁷⁹ the refugee crisis precipitated by the civil war, and the humanitarian crisis itself.¹⁸⁰ In subsequent resolutions, the Council took additional actions, including the deployment of observers and technical teams, the establishment of a U.N. Operation in Somalia (UNOSOM), an authorization to deploy security personnel, and finally, the institution of an emergency airlift.¹⁸¹ In August 1992, the number of U.N. personnel was substantially increased.¹⁸²

These measures, however, did not resolve the problem. Food and other supplies were regularly looted and aid agencies had to pay protection money in order to get supplies through.¹⁸³ The United States indicated that it was willing to deploy a substantial military force to facilitate the delivery of humanitarian supplies.¹⁸⁴ The Secretary General issued a report

178. S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg. at 2, U.N. Doc. S/RES/733 (1992). The arms embargo was for the purpose of establishing peace and stability in Somalia.

179. U.N. SCOR, 47th Sess., 3060th mtg., U.N. Doc. S/PV.3060 (1992).

180. *Id.*

181. S.C. Res. 746, U.N. SCOR, 47th Sess., 3060th mtg., U.N. Doc. S/RES/746 (1992), relied upon the request of the Secretary General, U.N. Doc. S/23693, *supra* note 177, to dispatch a technical team to Somalia which would establish mechanisms to ensure the unimpeded delivery of humanitarian assistance. The warring factions were also urged to abide by the cease-fire agreements. *Id.* ¶¶ 73, 74. Resolution 751 established a U.N. Operation in Somalia (UNOSOM), authorized immediate deployment of 50 observers to monitor the cease fire in the capital, and established a security force to facilitate the distribution of food and other humanitarian assistance. S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg. at 2, U.N. Doc. S/RES/751 (1992). Problems later developed in reaching agreement with the warring factions on deployment of this force. See *Report of the Secretary General on the Situation in Somalia*, U.N. SCOR, 47th Sess., U.N. Doc. S/24343 (1992). Resolution 767 (July 27, 1992) authorized an emergency airlift to deliver humanitarian assistance and called for cooperation in the deployment of the security personnel called for in Resolution 751. S.C. Res. 767, U.N. SCOR, 47th Sess., 3101st mtg. at 1-3, U.N. Doc. S/RES/767 (1992). The Council delivered a warning that it did not exclude other measures if cooperation was not forthcoming. It is not clear that consent was obtained for the airlift.

182. S.C. Res. 775, U.N. SCOR, 47th Sess., 3110th mtg. at 2, U.N. Doc. S/RES/775 (1992) authorized the deployment of an additional 4,200 personnel. This action was based upon the recommendation of the Secretary General, *The Situation in Somalia: Report of the Secretary General*, U.N. SCOR, 47th Sess. at 7, U.N. Docs. S/24480 and S/24480/Add. 1 (1992), who proposed deployment of additional forces in four zones. Previously forces had been limited to Mogadishu.

183. *Letter Dated 29 November 1992 from the Secretary General Addressed to the President of the Security Council*, U.N. SCOR, 47th Sess. at 3, U.N. Doc. S/24868 (1992) [hereinafter *Letter Dated 29 November*].

184. *Letter Dated 17 December 1992 from the Permanent Representative of the United States of America to the United Nations Addressed to the Security Council*, U.N. SCOR, 47th

laying out five options, one of which included a country-wide enforcement action by a group of Member States acting with authorization from the Security Council.¹⁸⁵ Based on this report, the Council adopted Resolution 794 on December 3, 1992, authorizing Member States to use force in order to secure the delivery of humanitarian assistance; the Unified Task Force (UNITAF) was created to carry out this task.¹⁸⁶

The Secretary General recommended, and the Council found, that there was a "threat" to the peace.¹⁸⁷ Thus, international jurisdiction no longer needed to be premised on consent. While the Council clearly no longer considered the situation essentially domestic, it failed to indicate what made the situation international. Member States referred to the situation as imperiling the stability of the region¹⁸⁸ and declared that the situation had simply reached a point where it constituted a "threat" to international peace and security.¹⁸⁹ It was emphasized that Somalia presented an exceptional and unique situation, that it was *sui generis*.¹⁹⁰ This is accurate, given the almost total breakdown of governmental

Sess., Annex, at 2, U.N. Doc. S/24976 (1992).

185. The Secretary General outlined five options directed towards creating conditions for the uninterrupted delivery of relief supplies to the starving people of Somalia: (1) to deploy UNOSOM in accordance with Resolution 775 and continue to operate according to traditional peace-keeping principles; (2) withdraw the military elements of UNOSOM; (3) have UNOSOM undertake a show of force in Mogadishu; (4) an enforcement action under the command of Member States; and (5) a country-wide enforcement action undertaken under U.N. command. See *Letter Dated 29 November, supra* note 183, at 2-6. The Secretary General concluded that option one was inadequate, that option two would admit defeat, that UNOSOM forces were insufficiently armed to carry out option three, and that the United Nations was not quite ready to undertake his preferred alternative, option five. *Id.* Option four was adopted.

186. S.C. Res. 794, *supra* note 26, at 3. The Unified Task Force (UNITAF) was established and commanded by the United States. Approximately 37,000 troops were eventually deployed in Southern and Central Somalia. *Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794 (1992)*, U.N. SCOR, 48th Sess., at 2, ¶ 6, U.N. Doc. S/25354 (1993) [hereinafter *Report of Secretary-General S/25354*].

187. See generally *infra* notes 299-304 and accompanying text.

188. U.N. SCOR, 47th Sess., 3145th mtg. at 19-20, U.N. Doc. S/PV.3145 (1992) [hereinafter S/PV.3145].

189. *Id.* For this conclusion, the Council relied upon the Secretary General's report, *Letter Dated 29 November, supra* note 183, at 3. In this report, the Secretary General stated:

[a]t present no government exists in Somalia that could request and allow such use of force. It would therefore be necessary for the Security Council to make a determination under Article 39 of the Charter that a threat to the peace exists, as a result of the repercussions of the Somali conflict on the entire region, and to decide what measures should be taken to maintain international peace and security. The Council would also have to determine that non-military measures as referred to in Chapter VII were not capable of giving effect to the Council's decisions.

Id. This statement does not explain what regional repercussions caused the situation to be a threat to the peace.

190. S/PV.3145, *supra* note 188, at 7 (Zimbabwe), 12 (Ecuador), 17 (China).

authority.¹⁹¹ Nonetheless, it may also indicate that Member States did not want this action to be interpreted as precedent for future situations.¹⁹² The Resolution, and most States, also underscored the humanitarian nature of these measures.¹⁹³

Unless refugees alone made the situation a "threat" to the peace, it must have been the humanitarian aspects which made this situation of international concern, because no other impact on the region was specified in the Secretary General's report, upon which the Resolution was based, nor in the debates, nor in the Resolution itself. Indeed, Austria noted that the Council was building on the precedent established in Resolution 688, which addressed the humanitarian crisis in Iraq.¹⁹⁴ A number of other Western States expressed the view that this was a collective humanitarian intervention. As for non-Western States, the concerns appeared to be more related to U.N., versus U.S., control over the operation, rather than whether this was an internal matter.¹⁹⁵ These States also cited the grave humanitarian situation and the humanitarian objectives behind the use of force. Thus, with this Resolution, a humanitarian crisis with no discernible cross-border effects, or at least none that involved military responses, triggered the most extreme measures the Council can undertake. This portends a truly revolutionary evolution in the role of the United Nations in internal conflicts.

With UNOSOM II, the Security Council decided to enter the nation-building, or perhaps rebuilding, business — a business, which the events of early June 1993 indicate, can become dirty and difficult. Resolution 814¹⁹⁶ established UNOSOM II, a chapter VII military action under U.N. command.¹⁹⁷ UNOSOM II was given a broad mandate which included the authority to take appropriate action against any faction that violated or threatened to violate the cessation of hostilities and to carry out such

191. *Id.* at 16 (China).

192. Resolution 794 recognized the unique character of the present situation in Somalia and is mindful of its deteriorating, complex, and extraordinary nature, requiring an immediate and exceptional response. S.C. Res. 794, *supra* note 26, at 1; S/PV.3145, *supra* note 188, at 16 (China), 7 (Zimbabwe).

193. The Resolution noted with grave alarm the deteriorating humanitarian situation and the underlying urgent need for the quick delivery of humanitarian assistance. S.C. Res. 794, *supra* note 26, at 1.

194. See S/PV.3145, *supra* note 188, at 31.

195. See *id. passim*.

196. S.C. Res. 814, *supra* note 26, at 1-6.

197. The Security Council determined that the situation in Somalia continued to threaten the peace. Previous chapter VII enforcement operations gave Member States the authority to use force and were therefore carried out by individual States.

functions as the Security Council authorized.¹⁹⁸ While UNOSOM II could use force, the Secretary General and Resolution 814 maintained that the United Nations would not be a substitute for the will of the people.¹⁹⁹ This indicated that even with a "threat" to the peace necessitating enforcement, such principles as self-determination and political independence remain. Accordingly, the United Nations would not impose a particular system of government, although the Secretary General maintained that it should be in a position to press for observance of U.N. standards of human rights and justice.²⁰⁰

On June 5th, 1993, a Pakistani contingent of UNOSOM II was attacked, killing over twenty soldiers, wounding over fifty, and leaving ten missing. One of the Somali factional leaders, General Aidid, was believed to be responsible.²⁰¹ Council members were outraged²⁰² and passed Resolution 837 in response.²⁰³ This Resolution reaffirmed that the Secretary General was authorized under Resolution 814 to take all necessary measures against those responsible, including investigation,

198. The mandate also included maintaining control of heavy weapons and seizing all small arms; securing and maintaining security at all ports; protecting the personnel, installations, and equipment of the United Nations pending the establishment of a new Somali police force which could assume this responsibility; continuing mine clearance; and assisting in the repatriation of refugees and displaced persons. *Report of the Secretary General S/25354*, *supra* note 186, at 12-13. UNOSOM was also expanded in terms of personnel. 20,000 military personnel, 8,000 logistical support staff, and a 2,800 person civilian support staff were authorized. S.C. Res. 814, *supra* note 26, at 4. The United States also agreed to supply a tactical quick reaction force which would be available in support of the Force Commander of UNOSOM II. *Report of Secretary-General S/25354*, *supra* note 186, at 17.

199. *Report of Secretary-General S/25354*, *supra* note 186, at 20 ("security, reconciliation and peace must spring from the Somalis themselves."); S.C. Res. 814, *supra* note 26, at 1.

200. *Report of Secretary General S/25354*, *supra* note 186, at 20. There is precedent for imposition of a human rights standard. Reports of tribal warfare and the slaughter of civilians in the Congo led to action by ONUC. The Secretary General viewed this as more than internal political conflict. Rather, it was a flagrant violation of elementary human rights and had characteristics of the crime of genocide. The Secretary General believed the United Nations could and should take action. See Miller, *supra* note 108, at 18. Here, it appears that the United Nations should press for U.N. standards of human rights and justice in the context of a political settlement and the choice of governmental organization. This is a substantial step, especially because it is within the context of an enforcement action. Moreover, the mandate of UNOSOM covered the entire country, including the North, which had issued a secession proclamation. The Secretary General maintained that extending the mandate to cover the North "would not prejudice in any way the decision of the Somali people on their national future." *Report of Secretary-General S/25354*, *supra* note 186, at 21.

201. Paul Lewis, *U.N. Asks Arrests of Somalia Killers*, N.Y. TIMES, June 7, 1993, at A3; Michael Littlejohns, *U.N. Acts After Somalia Killings: Call for Arrest of Warlord After Ambush of Pakistani Troops*, FIN. TIMES (London), June 7, 1993, at 14.

202. Littlejohns, *supra* note 201, at 14; Robin Wright & Josh Friedman, *U.N. Calls for Crackdown After Killings in Somalia*, L.A. TIMES, June 7, 1993, at A1.

203. S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg. at 1-3, U.N. Doc. S/RES/837 (1993).

arrest, detention, and prosecution. What followed were attacks upon Aidid's headquarters and other facilities.²⁰⁴ A number of civilians were killed in the process and segments of the Somali population turned against the United Nations.²⁰⁵ A massive manhunt was undertaken to find and prosecute Aidid.²⁰⁶

If the objective was to eliminate Aidid as a political force, this may indicate that the United Nations was markedly influencing the eventual political settlement.²⁰⁷ This is complicated by the finding that the situation in Somalia is a "threat" to the peace, an issue to which this article we will return.²⁰⁸ Given the broad powers accruing to the Council when it undertakes enforcement, and the exception in article 2(7) for enforcement measures, displacing an internal political force may be permissible if a safe and secure environment is necessary to restore peace and security. If Aidid's actions critically and negatively impact upon this objective, the Security Council may pursue a course of action that would eliminate him from the process. Still, this course of events is problematic because the United Nations was supplanting the people of Somalia in determining a settlement, in a situation where there appeared to be little, if any, outside interference. This differed from the situation in the Congo, where some charged that preventing the secession of Katanga usurped the exercise of self-determination by the Congolese people. In the Congo, there was credible evidence that the attempted secession was instigated and abetted by foreign forces.²⁰⁹ This is clearly not the case in Somalia, where all

204. Donatella Lorch, *U.N. Says Attack Dealt Heavy Blow to Somali Faction*, N.Y. TIMES, June 13, 1993, at A1; Keith B. Richburg, *U.S. Planes Launch U.N. Attack on Somali Warlord*, WASH. POST, June 12, 1993, at A1; Keith B. Richburg, *U.S. Planes Hit Mogadishu Again*, WASH. POST, June 13, 1993, at A1.

205. Leslie Crawford, *Somalis Cast U.N. Peacekeepers in Role of Tyrants*, FIN. TIMES (London), June 15, 1993, at 1; Donatella Lorch, *American Jets Fly Over Somali Capital, Provoking Jeers and Insults*, N.Y. TIMES, June 20, 1993, at A10; Keith B. Richburg, *Somali Mob Kills Three Journalists; Melee Follows Raid on Militia Forces*, WASH. POST, July 13, 1993, at A1.

206. Donatella Lorch, *Aidid's Forces Still Strong, U.N. Aides in Somalia Say*, N.Y. TIMES, June 21, 1993, at A6; *U.S. Admits Missile Error in Somalia*, GAZETTE (Montreal), June 16 1993, at A16.

207. Part of the U.N. mission has been to assist the Somali people in their efforts towards national reconciliation. The Secretary General's efforts in this regard are summarized in his Progress Report on the Situation in Somalia. *The Situation in Somalia; Progress Report of the Secretary-General*, U.N. SCOR, 48th Sess., at 1-3, ¶¶ 3-15 U.N. Doc. S/25168 (1993). Yet it has been continually acknowledged that reconciliation is ultimately in the hands of the Somali people. *Id.* at 3, ¶ 14.

208. See *infra* part II.B. It is also complicated by the difficulties entailed in enforcement, which negates consent, and in attempting to bring about a political settlement in the midst of ongoing hostilities. Inevitably hostilities will also be directed towards the United Nations itself. Truly, the United Nations is in a no-win situation.

209. Miller, *supra* note 108, at 2-3.

factions and forces were Somali and one faction, with a significant following, is being eliminated from the political process.²¹⁰ If a particular leader genuinely constitutes a "threat" to the peace, disposing of such a leader may be permissible, and that may have been the case here. But the burden of showing a "threat" to the peace should be high and the "threat" should be evident.²¹¹ That test was not met here.²¹²

c. Haiti

The situation in Haiti takes this complex problem another step further, for here the Organization mandated which of the competing factions was to be in power. The U.N. role in Haiti began with the supervision of Haiti's first free elections,²¹³ wherein Jean-Bertrand Aristide was elected President by an overwhelming majority.²¹⁴ Unfortunately, Aristide was deposed in a military-led coup less than a year later.²¹⁵ The General Assembly responded by strongly condemning the coup, and demanding immediate restoration of the legitimate elected government, full application of the Constitution, and full observance of human rights.²¹⁶ On October 3, 1991, the Security Council heard an impassioned plea from Aristide and discussed the matter, but took no action.²¹⁷

210. The highly negative public reaction in Somalia to U.N. activities indicates that General Aidid does have internal support.

211. Moreover, all of the issues addressed in part IV must be carefully thought through or such actions may begin to look like unilateral intervention in some cases. This is especially so if the military forces are from a dominant military power and there are suspicions that the Council is really a front for the interests of one State.

212. See *infra* notes 299–304 and accompanying text.

213. G.A. Res. 45/2, U.N. GAOR, 45th Sess., U.N. Doc. A/45/2 (1990). This assistance was requested by the lawful authorities of Haiti and assistance was rendered in cooperation with the Organization of American States (OAS). There was some debate as to whether the United Nations should be engaged in election monitoring, which was viewed by some as an internal matter. Yet the request and consent of the lawful authorities of Haiti were determinative in overcoming these objections. U.N. GAOR, 45th Sess., 26th mtg. at 61–64, U.N. Doc. A/45/PV.26 (1990). Several nations also noted the international aspects including refugees and potential dangers to peace and security. See *id.* at 22 (Dominican Republic), 52 (Bahamas), 62 (Bolivia); see also U.N. GAOR, 45th Sess., 29th mtg. at 57–58, U.N. Doc. A/45/PV.29 (1990)(Cuba).

214. President Aristide, who received almost 68% of the vote, has long enjoyed a large measure of popular support in Haiti. See generally AMY WILENTZ, *THE RAINY SEASON: HAITI SINCE DUVALIER LEFT* (1989).

215. *Haiti's Military Assumes Power After Troops Arrest the President*, N.Y. TIMES, Oct. 1, 1991, at A1; Howard W. French, *Army Strikes Back: Aristide Tried to Put Haitian Military Under Control at Last, So It Rebelled*, N.Y. TIMES, Oct. 2, 1991, at A12; David Adams, *Troops Hold Sway in Wrecked Haiti Capital*, INDEPENDENT (London), Oct. 4, 1991, at 11.

216. The Resolution also asked the Secretary General to consider providing support to the Secretary General of the OAS in implementing several OAS Resolutions that froze Haitian assets and imposed a trade embargo. G.A. Res. 46/7, *supra* note 141.

217. U.N. SCOR, 46th Sess., 3011th mtg. at 53–54, U.N. Doc. S/PV.3011 (1991); Anthony

The General Assembly returned to the situation, passing several resolutions on human rights and democracy in Haiti.²¹⁸ Few States officially professed that this was an internal dispute that should not be before the Assembly, although there are indications that it was a concern to some.²¹⁹ Nevertheless, concrete actions were centered upon the Organization of American States (OAS), indicating that the situation was not yet a matter for the Security Council.²²⁰ A special commitment to Haiti also stemmed from the U.N. role as an electoral observer,²²¹ in the view of some Member States. It was noted by others that it was not interference in the internal affairs of Haiti because the legitimate constitutional government of Haiti, presided over by Aristide, had called upon the international community to respond.²²² Others cited the growing refugee problem.²²³

Mexico noted that it was essential to distinguish those problems that are a "threat" to international peace and security, from those related to national crises, such as the disruption of the institutional order or situations raising humanitarian concerns. Although both merit attention, Mexico felt that to confuse the two raises institutional problems, given the clarity with which the U.N. Charter establishes mandates.²²⁴ Mexico's statements indicated that while the matter was of international concern, giving the

C. Arend, *The United Nations and the New World Order*, 81 GEO. L.J. 491 (1993). The Council may have considered the matter more appropriate for regional resolution given the prominent role played by the OAS. Moreover, the danger to the peace was not apparent. Finally, article 2(7) may have figured in the determination not to take action. *Id.*

218. *Human Rights in Haiti*, G.A. Res. 46/138, U.N. GAOR, 46th Sess., U.N. Doc. A/RES/46/138 (1992); *The Situation of Democracy and Human Rights in Haiti*, G.A. Res. 47/20, U.N. GAOR, 46th Sess., U.N. Doc. A/RES/47/20 (1992).

219. U.N. GAOR, 47th Sess., 71st mtg. at 41-42, U.N. Doc. A/47/PV.71 (1992). The Venezuelan representative noted the concern of some Member States at including Haiti in the work of the Security Council. But he judged it a potential threat to regional and international peace and security. He noted the consequences of hundreds of thousands of impoverished Haitians leaving Haiti for other countries. The tragedy, no longer confined to Haitian territory, was already spilling over Haiti's borders. *Id.* at 47. France noted that the situation could not fail to have an adverse impact upon the region. *Id.* at 52. The United States noted that the large migrations were a potentially destabilizing element for other States in the region. *Id.* at 78.

220. Brazil stated that the situation was not a threat to the peace and security of the region, but rather essentially of an internal nature and thus the most important forum to deal with it directly was the OAS. *Id.* at 46-48, 63. Mexico stressed the need to strengthen regional organizations and the inadvisability of transferring the matter to the Security Council, given the OAS actions thus far. *Id.*

221. *Id.* at 28 (United Kingdom).

222. *Id.* at 63.

223. *Id.* at 34-35 (Guyana), 47 (Venezuela).

224. *Id.* at 61. The Ambassador also noted that the fact that the Security Council does not assume responsibility does not detract from its importance. Not all problems of concern to the international community can be solved by recourse to the measures provided for in chapter VII of the U.N. Charter.

General Assembly a role, respecting the internal affairs of Haiti was of some importance.

Regional sanctions proved insufficient and on June 16, 1993, the Security Council, acting under chapter VII, imposed a mandatory embargo on petroleum or petroleum-related products, until the Secretary General determined that significant progress was made in resolving the political crisis in Haiti.²²⁵ The objective was to force negotiations, particularly by the military government, with the ultimate goal of restoring the Aristide Government. As in Somalia, an assessment of this objective was complicated by the finding of a "threat" to the peace and the use of chapter VII enforcement measures; both preclude application of article 2(7). But as in Somalia, the showing of a "threat" to the peace should be high and the "threat" should be evident. Moreover, the measures taken go beyond those taken in Somalia by demanding, in the face of mandatory sanctions, the return of a particular government to power.

Secretary General Dag Hammarskjöld warned against employment of U.N. elements in situations of an essentially internal nature, and this sound advice should be taken.²²⁶ At a minimum, it means impartiality and neutrality with respect to the underlying dispute.²²⁷ Professor Schachter has cautioned against using U.N. agents or pressure to bring about the victory of a particular faction or to determine the internal politics of a State.²²⁸ The potential for undermining such principles as sovereign equality, political independence, and basic human rights is overwhelming. Intervention which has the aim or effect of depriving the people of a country from freely choosing their government or adopting their constitutional, economic, and social arrangements are incompatible with basic tenets of the U.N. Charter.²²⁹ Haiti represents a very difficult case because Aristide clearly represented the choice of the people who elected him. It is equally clear, however, that there is a minority that is powerful enough to effectively deny him power. It may be up to internal political processes to change this result. While the international community can assist by isolating the military-led government, it is highly questionable whether it should force this result through the use of mandatory sanctions, behind

225. S.C. Res. 841, *supra* note 27. The Resolution also imposed a ban on arms and related material of all types and froze the overseas funds of the Government of Haiti. It relied upon previous OAS resolutions and actions taken by the Secretary General of that Organization.

226. Nathaniel L. Nathanson, *Constitutional Crisis at the United Nations: The Price of Peacekeeping*, II, 33 U. CHI. L. REV. 249, 308 (1966).

227. *Id.*

228. Schachter, *Authorized Uses of Force*, *supra* note 32, at 83-84.

229. That the government has requested or agreed to such an intervention does not make it less so. *Id.*

the screen of a "threat" to the peace.²³⁰ Although the Council took pains to stress the unique and exceptional circumstances of the situation in Haiti, the decision remains problematic.

II. THE CAPACITY TO TAKE ACTION

A. *The Competency of Various Organs*

Having settled that the United Nations will have jurisdiction in an increasing number of internal conflicts, it must now be determined what measures it can undertake. Professor Schachter has described ten functions that the United Nations has performed in internal conflicts, ranging from public debate and the expression of international concern, to sanctions and enforcement measures.²³¹ The organs that have carried out these objectives are the Security Council, the General Assembly, and the Secretary General.²³² Each has a distinct role under the U.N. Charter and in practice,²³³ and these roles often overlap. For example, both the Secretary General²³⁴ and the Security Council can act as third-party intermediaries,

230. If the international community decides to force results in similar circumstances, the need for a more broadly representative Security Council and the articulation of norms becomes acute.

231. Others include: (1) quiet diplomacy, good offices, and conciliation; (2) inquiry and reporting; (3) assistance in ascertaining the "will of the people"; (4) on-the-spot observation and surveillance; (5) consensual peace-keeping and technical cooperation; (6) economic assistance and technical cooperation; (7) determination of governments entitled to representation in the United Nations; and (8) the elaboration of norms and criteria of conduct. Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 426-45.

232. The specialized agencies provide technical assistance. The International Court of Justice, which is the principle legal organ of the United Nations, can decide legal disputes if all parties consent to its jurisdiction. Statute of the International Court of Justice, June 20, 1945, arts. 1, 36, 59 Stat. 1055, 1060. Only States, not individuals or organizations may be parties in cases before the Court. *Id.* art. 34(1), 59 Stat. at 1059.

233. See RIGGS & PLANO, *supra* note 21. Whether or not a particular organ dominates at a certain point in time depends on international politics. For instance, during the first ten years of the United Nations, the General Assembly eclipsed the Security Council as a forum for airing disputes and dealing with threats to the peace. Western viewpoints dominated and this shift was essentially the U.S. response to Soviet vetoes in the Security Council. *Id.* at 192. This is epitomized by the *Uniting for Peace* Resolution in 1950. G.A. Res 377, U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc A/1775 (1951); see also *infra* note 241. As the General Assembly expanded to include newly-independent States from Africa, Asia, and the Caribbean, this organ began to vote against Western interests and became a tool to advocate and advance the concerns of developing countries. See EVAN LUARD, *A HISTORY OF THE UNITED NATIONS, VOL. 2: THE AGE OF DECOLONIZATION 1955-1965*, at 5-6 (1989). Consequently Western commentators and States began to downplay the competency and significance of this organ by stressing, for example, that it lacked authority to make binding law. Currently the center of power has shifted back to the Security Council.

234. The Secretary General is the Chief Administrative Officer of the United Nations and is appointed by the General Assembly upon the recommendation of the Security Council. U.N. CHARTER art. 97; RIGGS & PLANO, *supra* note 21, at 112. The Secretary General can bring any

and facilitate discussion and informal consultations.²³⁵ Both the Security Council and the General Assembly can express international concern.

Because internal conflicts often affect the peace, it is clear that the Security Council is vested with the broadest range of powers in this arena and the prerogatives of the other organs are limited in comparison.²³⁶ For example, although the General Assembly can discuss any situation regarding the maintenance of international peace and security brought before it²³⁷ and make recommendations,²³⁸ it cannot issue mandatory decisions or take action with respect to these matters because "action" has been defined as enforcement measures under chapter VII; such measures are within the sole province of the Security Council.²³⁹ Furthermore, while the Security Council is exercising its functions under the Charter, the General Assembly may not make recommendations with respect to that dispute unless the Security Council so requests.²⁴⁰

Member States have explicitly conferred upon the Security Council primary responsibility²⁴¹ for the maintenance of international peace and

matter which in his opinion threatens international peace and security to the attention of the Security Council. U.N. CHARTER art. 99. This option was utilized by Secretary General Dag Hammarskjöld in the case of the Congo. The Secretary General can be a very important U.N. dispute settlement resource, whether acting at the direction of the Security Council, the General Assembly, on his own initiative or at the request of a party. Often acting as a third-party intermediary, he can act without the disadvantages of extensive publicity and public debate. RIGGS & PLANO, *supra* note 21, at 193. Since these organs are dependent on reports prepared by the Secretariat, the Secretary General can also be instrumental in shaping the character of the debate and the options ultimately adopted.

235. As to the Security Council, see RIGGS & PLANO, *supra* note 21, at 190. As for the Secretary General, see BOUTROS-GHALI, *supra* note 10.

236. In *An Agenda For Peace*, Secretary General Boutros-Ghali prescribes broad roles for the General Assembly, the International Court of Justice, the Security Council and the Secretariat. BOUTROS-GHALI, *supra* note 10.

237. Any Member or non-Member State may bring any dispute, or any situation which might lead to international friction or give rise to a dispute, to the attention of the General Assembly. U.N. CHARTER arts. 34, 35.

238. *Id.* art. 11.

239. *Id.* art. 10.

240. U.N. CHARTER art. 12. The General Assembly may bring to the Security Council's attention matters which are likely to endanger peace and security. U.N. CHARTER art. 11, ¶ 3.

241. In 1950, the General Assembly approved the *Uniting for Peace Resolution* which gave the General Assembly authority to make recommendations when there appears to be a threat to the peace, breach of the peace, or act of aggression, and the Security Council, because of a lack of unanimity among its permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security. This includes recommendations for the use of armed force in the case of a breach of the peace or act of aggression. *Uniting for Peace*, *supra* note 233. Given the apparent demise of the veto for the time being, it is unlikely this resolution will be relevant in the near future. Still it is a residual source of authority for the General Assembly if the veto reappears and has been utilized in such major U.N. undertakings as the first U.N. Emergency Force (UNEF). See BLUE HELMETS, *supra* note 3, at 46 (citing G.A. Res. 998(ES-I)95 authorizing peacekeeping forces in Egypt).

security and the Council acts on their behalf in this field.²⁴² The Council is granted specific authority in chapters VI,²⁴³ VII,²⁴⁴ VIII,²⁴⁵ and XII²⁴⁶ for the discharge of these duties,²⁴⁷ and also possesses such general powers as are commensurate with its responsibility to maintain peace and security.²⁴⁸ The only limitations upon these very broad and general powers are the fundamental principles and purposes of chapter I,²⁴⁹ which tend to be abstract, general, difficult to apply, and sometimes irreconcilable.²⁵⁰

B. "Dangers" or "Threats" to the Peace

1. Overview

The drafters of the U.N. Charter foresaw two principal methods of maintaining the peace:²⁵¹ the collective measures described in chapter VII²⁵²

242. U.N. CHARTER art. 24, ¶ 1.

243. Chapter VI prescribes procedures for the pacific settlement of disputes.

244. Chapter VII governs action in response to threats to the peace, breaches of the peace, and acts of aggression.

245. Chapter VIII delineates the Organization's relationship with regional organizations.

246. Chapter XII governs the almost defunct international trusteeship system.

247. U.N. CHARTER art. 24, ¶ 2.

248. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 3, 52.

249. *Id.* at 52. The purposes of the United Nations are delineated in article 1 and include maintaining international peace and security; developing friendly relations among nations based on the principles of equal rights and self-determination; international cooperation in solving international problems of an economic, social, and humanitarian character, including the promotion and encouragement of respect for human rights; and acting as a center for harmonizing the actions of nations in attaining these common ends. U.N. CHARTER art. 1. Principles are prescribed in article 2 and include recognition of the sovereign equality of States, the obligation to settle disputes peacefully, a prohibition on the threat or use of force in international relations, and noninterference in domestic matters. U.N. CHARTER art. 2. Carl-August Fleischhauer, Under-Secretary General of the United Nations and Legal Counsel, has characterized these principles as a "veritable code of conduct," meant to go much further than mere declarations. They are contained in a multilateral treaty and are therefore part of the treaty obligations of Member States, including members of the Security Council. Carl-August Fleischhauer, *Compliance & Enforcement in the United Nations System*, 85 AM. SOC'Y INT'L L. PROC. 428, 429-30 (1991).

250. General principles tend to be highly abstract and therefore applicable to an indeterminate series of events which extend outward from a core meaning. There are core cases where they obviously apply, and a much larger number of situations where there are arguments for and against their applicability. Because they are general and fundamental they tend to clash with each other in specific cases. For instance, how do we reconcile self-determination and territorial integrity? They compete because they express competing aims and interests of the international community. Schachter, *Law and Politics*, *supra* note 89, at 191-92.

251. U.N. CHARTER art. 1, ¶ 1.

252. Under chapter VII, the Security Council determines the existence of a threat to the peace, breach of the peace, or act of aggression. U.N. CHARTER art. 39. This finding need not be explicit. Miller, *supra* note 108, at 4. For example, in authorizing the necessary military

and the peaceful settlement measures recounted in chapter VI.²⁵³ To carry out these objectives, the Security Council was given immense, if not unlimited powers, that include the option to authorize or use force. Nevertheless, force can only be used if there is a "threat" to or "breach" of the peace, or an "act of aggression." The Charter neither defines these terms, nor those situations whose continuation is likely to endanger the maintenance of international peace and security.²⁵⁴ The Security Council makes this determination²⁵⁵ based on various considerations, which include factual findings, interpretations of Charter provisions, and the weighing of political considerations; the concepts employed are not solely legal in

assistance needed by the government of the Congo to meet its security needs, the Council did not find a threat to the peace. U.N. SCOR, 15th Sess., 873d mtg. at 1, U.N. Doc. S/4387 (1960). It has been argued that the Council acted under chapter VII, more specifically article 40, which provides for provisional measures, and thus there was an implicit finding of a threat to the peace. Miller, *supra* note 108, at 4-5. Moreover, the Council is not obligated to make such a finding even if the facts indicate it is warranted. GOODRICH & SIMONS, *supra* note 39, at 352-54, 363-65. Upon such a finding, it can make recommendations or decide upon appropriate measures under articles 41 and 42. Article 41 delineates nonforcible measures, such as economic sanctions, severing diplomatic relations, and disrupting communications. U.N. CHARTER art. 41. If these measures prove to be inadequate, the Council can take action by air, sea, and land forces to maintain or restore international peace and security. *Id.* art. 42.

253. "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute." U.N. CHARTER art. 34. Members and nonmembers may bring such disputes to the Security Council. *Id.* art. 35. Nonmembers must accept the obligations of peaceful settlement in advance. *Id.* The Security Council is not obligated to discuss every complaint submitted to it. Potentially inflammatory debates have been avoided by prior consultations and informal decisions not to place an item before the Council. RIGGS & PLANO, *supra* note 21, at 190. For example, the Security Council refused to place executions by the Franco regime in Spain on its agenda when requested by Mexico. *Id.* The parties may also bring the dispute or situation to the General Assembly. U.N. CHARTER art. 35. At any stage, the Security Council may recommend appropriate procedures or methods of settlement. *Id.* art. 36, ¶ 1. If peaceful settlement measures fail, the parties are to refer the dispute to the Security Council which can recommend appropriate procedures or methods of settlement, if it finds that continuance of the dispute is in fact likely to endanger the maintenance of international peace and security. It can also recommend terms of settlement. *Id.* art. 37. Peaceful settlement includes negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, and other peaceful means the parties might choose. *Id.* art. 33. The parties to any dispute whose continuance is likely to endanger the maintenance of international peace and security obligate themselves to seek a solution through one of these methods. *Id.* arts. 1, 33.

The measures in chapter VI are not mandatory, although Member States do obligate themselves to settle their disputes peacefully. This paradigm affords the parties a third-party mechanism to work out disputes, and it has been useful. Moreover, the investigatory function permits the Security Council to determine at an early stage if disputes might endanger the peace. See BOUTROS-GHALI, *supra* note 10.

254. U.N. CHARTER arts. 33, 39.

255. *Id.* art. 39; GOODRICH & HAMBRO, *supra* note 19, at 156. Only the Security Council can decide upon forcible measures, under articles 41 and 42. While the General Assembly cannot take action, it does possess residual authority to maintain the peace, because the Security Council's responsibility is primary, not exclusive. GOODRICH & SIMONS, *supra* note 39, at 345; see also *supra* notes 233-41 and accompanying text.

nature.²⁵⁶ The terms defining situations where force may be used have, in fact, been used rather loosely, despite efforts to define them with some precision.

No internal conflict has been found to be a "breach" of the peace,²⁵⁷ or to rise to an "act of aggression."²⁵⁸ This is probably due to how these conflicts have impacted upon international peace, and the manner in which the Council has generally employed the terms "breach" of the peace²⁵⁹ and "act of aggression."²⁶⁰

256. GOODRICH & SIMONS, *supra* note 39, at 351, 363. Given the unwillingness to utilize the ICJ, the facts are only one determinant. The Council has also been motivated to settle the dispute peacefully and avoid unnecessary difficulties in reaching a result. Thus, a finding may or may not be made at a particular time to nudge the process forward, to prevent deterioration of the situation, to avoid alienating a party, and so forth. States are also motivated by national concerns and interests. *See id.* at 343-46.

257. The Council has generally been reluctant to find breaches of the peace, although when such a finding has been made it has been accompanied by Council action. WHITE, *supra* note 37, at 37, 41. Various acts could be considered breaches of the peace. For instance, any resort to armed force would suffice if it involved a military operation by one country against another. Even when the use of armed force has gone beyond local skirmishes, however, Council members have been reluctant to make a formal finding of a breach of the peace. This was probably due, in many cases, to major power disagreement over the respective responsibilities of the parties involved. GOODRICH & SIMONS, *supra* note 39, at 365. When North Korean forces crossed the 38th parallel and attacked South Korea, the Security Council determined that there had been a breach of the peace. U.N. SCOR, 5th Sess., U.N. Doc. S/1501 (1950). Referring to General Assembly Resolution 293 which recognized the government of the Republic of Korea based in South Korea, the Council was able to view this as an international breach of the peace. If North and South Korea had been seen as one country, temporarily separated by the 38th parallel, it could have been viewed as a civil war. WHITE, *supra* note 37, at 45; *see also* Sohn, *supra* note 4, at 209 (excepting this conflict from the civil war category).

258. Aggression, which is the most serious finding the Council can make, has been defined by the General Assembly as the use of armed force by a State against the sovereignty, territorial integrity, or political independence of a State or in any manner inconsistent with the U.N. Charter *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 24th Sess., Annex, art. 1, U.N. Doc. A/3314 (1974). In the case of an internal conflict, this might include aiding rebel forces, an act which has been found to be in violation of article 2(4) of the Charter. *Declaration on Friendly Relations*, *supra* note 31. A finding of an act of aggression labels or condemns one party to the conflict as the guilty party, and consequently it has not been utilized on a regular basis by the Security Council. WHITE, *supra* note 37, at 47. For instance, despite the almost universal condemnation of Iraq's invasion of Kuwait, it was not labeled an act of aggression, but a breach of international peace and security. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg. at 1, U.N. Doc. S/RES/660 (1990).

259. Security Council resolutions on the North Korean invasion of South Korea, the Falklands conflict, the Iran-Iraq conflict, and the Iraqi invasion of Kuwait, did make such a finding. In all of these cases, armies crossed international boundaries; the resort to armed force across borders easily comes within the meaning of breach of the peace. This may not be the case in intra-State conflicts where there is often no clear aggressor. MURPHY, *supra* note 62, at 136.

260. Because it is such a powerful finding, the aggression must be clear. This is unlikely in internal conflicts because any aid given is likely to be surreptitious and secretive. *See generally* MURPHY, *supra* note 62, at 165. The Security Council has never made a finding of indirect aggression. WHITE, *supra* note 37, at 48.

2. "Threats" to the Peace

Internal conflicts have however been found to be "dangers" and "threats" to the peace. "Threat" to the peace is a flexible concept that may cover anything from intra-State situations to inter-State confrontation;²⁶¹ it was originally viewed as a precursor to a finding of a "breach" of the peace.²⁶² A number of internal situations have been found to be "threats" to the peace because of intervention, or the potential for intervention, by foreign forces.²⁶³ Thus in the Congo, the presence of Belgian forces was found to be a "threat" to the peace and the Council called for their removal.²⁶⁴ The same was true of the situation in Cyprus, where a Greek-backed coup was followed by a Turkish invasion of the northern part of the island.²⁶⁵ If civil disorders are such that they invite foreign intervention, these disorders might also be "threats" to the peace; such was the case in the Congo and Cyprus.²⁶⁶ Moreover, secession, if believed to be foreign inspired, can be a "threat" to the peace.²⁶⁷ Internal struggles within

261. WHITE, *supra* note 37, at 41.

262. *Id.* at 44; GOODRICH & SIMONS, *supra* note 39, at 360-61. Both of these sources cite the 1948 invasion of Palestine by surrounding Arab countries after the State of Israel was proclaimed. The Security Council characterized the situation as a threat to the peace under article 39, ordered provisional measures under article 40, and found that a failure to comply would demonstrate the existence of a breach of the peace. WHITE, *supra* note 37, at 44.

263. If not for the Soviet veto, the Security Council probably would have found, in the Greek complaint of December 1946, that support of armed bands formed in the territory of one State and crossing into the territory of another, or the refusal of a government to take all possible measures in its territory to deprive such bands of any aid or protection, should be considered a threat to the peace within the meaning of the Charter. GOODRICH & SIMONS, *supra* note 39, at 381.

264. S/4741, *supra* note 127, at 1.

265. The Security Council adopted Resolution 353 on July 20, 1961, which stated that there was a serious threat to international peace and security and demanded an end to foreign intervention. S.C. Res. 353, U.N. SCOR, 29th Sess., 1781st mtg. at 1, U.N. Doc. S/RES/353 (1974); BLUE HELMETS, *supra* note 3, at 301.

266. Civil disorders may provoke a reaction to internal events by foreign States, versus foreign inspired subversion. Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 401. As for Cyprus, see U.N. SCOR, 19th Sess., 1098th mtg. at 2, U.N. Doc. S/186 (1964), which classified the violent eruptions on the island as likely to threaten international peace. This stemmed from potential Greek and/or Turkish intervention, which was later realized when Turkey invaded Cyprus. See *supra* note 108 and accompanying text. In the Congo, civil disorders prompted Belgian intervention. Consequently, the Organization attempted to quell the disorders, restore the ability of Congolese forces to undertake this responsibility, and called for the withdrawal of Belgian troops. S.C. Res. 143, U.N. SCOR, 15th Sess., 873d mtg., U.N. Doc. S/RES/143 (1960); S.C. Res. 145, U.N. SCOR, 15th Sess., 879th mtg., U.N. Doc. S/RES/145 (1960).

267. In the case of the Congo, it was widely believed that the secession of the province of Katanga was inspired by Belgium, other Western Nations, and more particularly the *Union Minière du Haut Katanga*, all of whom were interested in Katanga's vast mineral deposits. Various actions by the indigenous population supported the idea that this may not have been a genuine exercise of self-determination. See, e.g., FRANCK & CAREY, *supra* note 108, at 17;

a State may also manifest international effects in the form of attacks upon other States, as was the case in South Africa.²⁶⁸

3. "Dangers" to the Peace

Chapter VI, which prescribes peaceful settlement measures to deal with "dangers" to the peace,²⁶⁹ was to apply to serious disputes, thus distinguishing between disputes or situations of minor importance, and those whose continuance might lead to a "breach" of the peace.²⁷⁰ The Security Council is afforded investigatory powers to make this determination and thus it has authority to concern itself with a dispute or situation well in advance of it becoming an actual "threat" to the peace.²⁷¹ Through investigatory organs established to keep them informed of developments in disputes or situations, the Security Council can also determine if a situation has deteriorated to the point where it has become a "threat" or "breach" of the peace.²⁷²

4. Discerning the Difference Between "Dangers" and "Threats" to the Peace

The crucial question is determining when a dispute is a "danger" to the peace where the recommendatory peaceful settlement mechanisms requiring consent to intervention apply, versus a "threat" to the peace

Franck, *supra* note 108, at 648-49; Oscar Schachter, *Preventing the Internationalization of Internal Conflict: A Legal Analysis of the U.N. Congo Experience*, 57 AM. SOC. INT'L L. PROC. 216, 223 (1963).

268. The internal struggle centered around Apartheid. The outward manifestations were attacks upon neighboring States, which were sometimes harboring guerilla forces that were struggling against Apartheid.

269. GOODRICH & HAMBRO, *supra* note 19, at 140. Article 2(3) generally and article 33 specifically, obligate U.N. Members to seek solutions to their serious disputes through pacific means.

270. U.N. CHARTER art. 1, ¶ 1; GOODRICH & HAMBRO, *supra* note 19, at 60. The Organization was not to undertake settlement of all disputes or situations; it was to concern itself only with those which might lead to a breach of the peace. *Id.* at 60. Goodrich and Hambro noted the difficulty in deciding whether a dispute is such that its continuance is likely to endanger international peace. They postulated that disputes can become so persistent and bitter that they poison international relations and create a political climate where States are tempted to use force because the situation becomes unbearable. Alternatively, States acting in good faith may become involved in a series of events which lead to the use of force without either party initially desiring it. Disputes of this sort were to be dealt with by the Organization. *Id.* at 140.

271. U.N. CHARTER art. 34; GOODRICH & SIMONS, *supra* note 39, at 175-76. This investigation may be on the Council's own initiative, following a formal request under article 35, or upon recommendation by the Secretary General under article 99.

272. GOODRICH & SIMONS, *supra* note 39, at 351. This was crucial in Korea where the United Nations had the benefit of detailed reports from the U.N. Commission on Korea.

where enforcement measures are permitted.²⁷³ Past Security Council practice makes discerning this difference difficult.²⁷⁴

In its early years, the Council tried to distinguish between "dangers" and "threats" to the peace by focusing on the immediacy of the situation.²⁷⁵ One analyst postulates that there is no longer a substantive, factual distinction between a "danger" and a "threat" to the peace. Rather, the use of a particular label may depend upon whether the Council is willing to take mandatory measures or prefers to make nonbinding recommendations.²⁷⁶ He maintains that as mandatory measures became increasingly impotent and unenforceable,²⁷⁷ findings of a "threat" to the peace became more prolific.²⁷⁸ But mandatory measures are no longer unsubstantial, and

273. WHITE, *supra* note 37, explains that originally, there was to be a bridge between chapters VI and VII. A situation that was a potential danger could become a threat if the parties ignored article 36(1) recommendations or if those recommendations or article 33(1) procedures failed. Thus, the scale of the conflict itself would not determine whether it was a threat, but merely a failure to resolve it under chapter VI. This proposal was rejected only because it might fetter the discretion of the Council.

274. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Article 31 delineates general rules of interpretation and provides that, together with the context, we should take into account, *inter alia*, (a) any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation, and (b) any relevant rules of international law applicable in the relations between the parties. Article 5 provides that the Convention applies to treaties that are the constituent instruments of international organizations. The practice of an organization, which is not inconsistent with its constituent instrument, can have legal effect. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 3.

275. The Fascist Franco regime in Spain prompted discussion on how immediate a threat to the peace it posed. It was argued that a threat to the peace implied a state of affairs in which there was a situation of potential danger that required steps by the Council. Whether a situation fell under articles 39 or 34, depended on whether it was immediate or remote. GOODRICH & SIMONS, *supra* note 39, at 355-56. The test appeared to be the immediacy of war or conflict. Moreover, given the potential consequences of a chapter VII finding, there was probably some reluctance to find a threat to the peace unless there was a real and immediate danger. WHITE, *supra* note 37, at 37.

276. See WHITE, *supra* note 37, at 37 (maintaining that a threat to the peace merely may be a legal tool for the imposition of mandatory sanctions).

277. The failure to conclude article 43 agreements meant that the Council did not have armed forces at its disposal and thus had to rely on its power to exhort and recommend, rather than its power to order. This tended to reduce the importance of the distinction between measures taken under chapter VI and action taken under chapter VII. GOODRICH & SIMONS, *supra* note 39, at 346.

278. Professor White uses as an example the situation in Southern Rhodesia when the Smith regime unilaterally declared independence in 1965, with the intent of giving no political rights to the black majority. WHITE, *supra* note 37, at 139. The first resolution mentioning international peace and security stated that continuance of the situation constituted a threat to international peace and security. U.N. SCOR, 20th Sess., at 1, ¶ 1, U.N. Doc. S/RES/217 (1965), reprinted in JERICHO NKALA, THE UNITED NATIONS, INTERNATIONAL LAW AND THE RHODESIAN INDEPENDENCE CRISIS 241 (1985). Part of the reason chapter VII was not invoked may have been the opposition of the United Kingdom. This resolution imposed a nonmandatory economic embargo. *Id.* at 81. The next resolution found a threat to the peace because substantial supplies of oil were reaching Southern Rhodesia by way of Portuguese Mozambique. *Id.*; U.N. SCOR,

thus this thesis may no longer be useful.²⁷⁹ Consequently, it might be logical to begin delineating a line between the two once more, given the now genuine difference in measures that can be taken under these chapters. On the other hand, this must be balanced with flexibility to address the myriad situations that the Council will face.²⁸⁰

5. Application to Current Conflicts

In the current international milieu, the willingness or reluctance to undertake certain kinds of action will undoubtedly continue to influence Security Council findings on "threats," as opposed to "dangers," to the peace. But given the limited resources at the disposal of the Council, and the numerous internal struggles in progress or in utero, the immediacy and seriousness of the conflict might again be a worthwhile determinant. Finding a "danger" to the peace might also be a useful precursor to finding "threats" to the peace in these disputes. Investigations and factual determinations, which admittedly have political overtones, can assist in determining the immediacy and seriousness of the conflict. Moreover, chapter VI affords a broad handle for the Secretary General whose good offices should be strengthened.²⁸¹

21st Sess., U.N. Doc. S/RES/221 (1966). This resolution was passed at the request of the United Kingdom, which desired chapter VII authority to use force to stop ships about to unload large quantities of oil that would be pumped via pipelines to Southern Rhodesia. NKALA, *supra*, at 91-99. The resolutions imposing mandatory economic sanctions found the situation in Southern Rhodesia to be a threat to the peace and the Security Council imposed mandatory economic sanctions under chapter VII. See, e.g., S.C. Res. 232, *supra* note 43; U.N. SCOR, 23d Sess., U.N. Doc. S/RES/253 (1968) and subsequent resolutions, finding the requisite threat to international peace and imposing mandatory Council decisions under chapter VII. All enforcement measures, from 1966 on were of a nonmilitary nature and the resolution of 1968 was not only mandatory, but comprehensive, covering a broad range of Rhodesian economic activity. Yet these sanctions were widely breached.

279. Depending on the situation, enforcement measures may involve the use of military force against a State. See, e.g., S.C. Res. 814, *supra* note 26, authorizing the use of force against Somalia. Of course, some resolutions remain unenforced, such as recent exhortations on the situation in Bosnia-Herzegovina where the Council has demanded that military actions cease, while the war continues in full force. John F. Burns, *Bosnia Loses Any Hope of Being Saved*, N.Y. TIMES, July 25, 1993, § 4, at 1, 6.

280. The drafters gave the Council broad discretion to take whatever action was appropriate when maintaining the peace. It could concentrate on peaceful settlement or adjustment; utilize provisional measures to prevent the situation from deteriorating or to create conditions favorable to peaceful settlement; or use coercive measures to suppress any act of aggression. The responsible organs were authorized to use whatever methods, in whatever order or combination seemed most likely under the circumstances, to achieve the desired end. GOODRICH & SIMONS, *supra* note 39, at 344.

281. BOUTROS-GHALI, *supra* note 10, at 20. As a method of furthering the peaceful settlement of international disputes, the good offices of the Secretary General include: (1) forms of diplomatic assistance such as informal contacts and consultation with parties to a dispute; (2) diplomatic action designed to express international concern, induce the parties into talks and assist them in finding a suitable framework for settlement; (3) mediation, conciliation, and

The Security Council should not, and probably cannot, intervene in a major fashion in all civil unrest.²⁸² Rather, the Council should seriously consider not only whether there is an international impact, but also the nature of that impact upon world peace. The investigatory powers accorded to the Council in article 34 should be broadly utilized to determine what is actually transpiring in any particular case,²⁸³ and how it might affect world peace. For international mobilization of a military or nonmilitary nature, internal strife should approach some threshold — it should at least be an immediate and actual “threat” to international peace.²⁸⁴

In distinguishing between “dangers” and “threats” to the peace, Professor Szasz’s criteria for internationalizing a conflict²⁸⁵ are a sound starting point, for in many of these circumstances the possibility of outside intervention, and thus a “danger” or “threat” to the peace in the form of inter-State conflict, is elevated. Yet, notwithstanding that many of these categories will make more conflicts of international concern,²⁸⁶ they do not necessarily make them “threats” to the peace. For instance, while human rights violations are a broader category warranting a widening of international concern, such abuses do not necessarily invite outside intervention or cause regional instability.²⁸⁷ Rather, whether this result transpires depends upon how surrounding States react. Depending on religious or ethnic sensitivities or the particular geopolitics of the region,

coordination; and (4) inquiries, factfinding, the supervision of plebiscites, elections, or referenda, and the determination of legal rights and duties in a specific situation. B.G. Ramcharan, *The Good Offices of the United Nations Secretary General in the Field of Human Rights*, 76 AM. J. INT’L L. 130, 132 (1982) (quoting V. PECHOTA, *THE QUIET APPROACH: A STUDY OF GOOD OFFICES EXERCISED BY THE SECRETARY GENERAL IN THE CAUSE OF PEACE* 13 (UNITAR 1972)). Mediation implies an effort by an outside party to assist the disputants in reaching a solution. Conciliation is generally defined as a process instituted by the parties themselves who agree to submit their dispute to a specially-constituted organ for investigation and efforts to effect a settlement. See GOODRICH & SIMONS, *supra* note 39, at 292.

282. Besides political and legal constraints, there are monetary restraints. Ian Davidson, *Peace, But Not at Any Price*, FIN. TIMES (London), June 19, 1993, at 8.

283. Edward C. Luck, *Making Peace*, 89 FOR. POL’Y, Winter 1992–93, at 137, 143–44.

284. Schachter, *Authorized Uses of Force*, *supra* note 32, at 86.

285. See *supra* notes 104–11 and accompanying text.

286. See *supra* notes 131–34 and accompanying text.

287. Lori F. Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, *supra* note 30, at 215. Mass killings do not necessarily prompt intervention. For instance, in China, which is a permanent member of the Security Council with a veto, there was little likelihood of intervention when over a thousand students were massacred in Tienanman Square. The uprising was of short duration, there was little likelihood of a spill-over across international borders, and no possibility of intervention.

such abuses may or may not cause grave difficulties and unrest in the region, or prompt a massive exodus which may, or may not, depending upon various factors cause a "danger" or "threat" to the peace.²⁸⁸ Thus, unless we are prepared to say that human rights abuses of a certain kind or intensity are in and of themselves a "danger" or "threat" to the peace, their impact upon the region and international community as a whole must be assessed.²⁸⁹

If a conflict is of significant size, intensity, or length, there is more likelihood of human rights violations and an increased potential to cross international borders.²⁹⁰ This might increase pressures for intervention by other States,²⁹¹ depending upon the circumstances.²⁹² Generally, as the level of intensity of many of these elements increases, the likelihood of other elements becoming applicable also multiplies and together these factors make the situation more likely to be at least a "danger" to the

288. The massive exodus of Iraqi Kurds would be an example of human rights abuses causing at least a "danger", and perhaps an actual "threat" to the peace.

289. See Scheffer, *supra* note 29, who makes the case for collective humanitarian intervention. Scheffer notes that threats to the peace were found in the racist policies of South Africa and Rhodesia and in the civil war in Iraq, which triggered the mass migrations of Kurds and Shiites across Iraqi borders. This was the finding even though all of the fighting occurred in Iraq. The civil wars in Somalia and Yugoslavia were also found to be threats to the peace. Yet Scheffer acknowledges that there is still considerable opinion that limits the premise for Security Council action within sovereign borders. Nonetheless, he argues for classifying large-scale humanitarian crises as presumptive threats to the peace. The notion of security has been expanding to embrace ethnic and environmental problems. The heightened recognition of ethnicity in the aftermath of the Cold War means more is at stake when an ethnic group within a State is subjected to mass violations of human rights because it is now more likely to trigger the ethnic group at large to react violently. Moreover, he asserts that experience shows that the invariable effect of massive violations of human rights is: (1) large refugee migrations; (2) internal armed conflicts that ultimately spill across national borders and trigger broader armed conflicts; (3) dangerous pressures on the availability and distribution of regional resources; or (4) transnational environmental and health problems. Scheffer also asserts that the obligation of States to comply with international human rights diminishes the necessity of defining a threat to the peace as a cross-border phenomenon. How a nation treats its peoples within its borders has become a legitimate matter of international inquiry and if necessary, intervention. *Id.* at 287-88.

In this author's opinion, the debates on the adoption of Resolution 688 would appear to indicate otherwise. But with the recent resolutions on Somalia, perhaps the Security Council is moving in this direction. See *supra* notes 187-95 and accompanying text.

290. Such spillover may include a massive outflow of refugees. Moreover, in a long, intense conflict, it is likely that other States in the area will have some, and perhaps a growing, interest whether it is based on historical, ethnic, or political ties or due to fears of regional instability or refugees.

291. For instance, in Bosnia and Hercegovina, Muslim States have attempted to smuggle weapons to Bosnian Muslims, while Serbian support for Serbian Bosnians has been the subject of Security Council sanctions. U.N. SCOR, 47th Sess., 3082d mtg., U.N. Doc. S/RES/757 (1992); see also Hugh Pope, *Turks Call for Weapons from Islamic Nations*, INDEPENDENT (London), Jan. 12, 1993, at 8; Claude Van England, *Islamic States' Concern for Bosnia*, CHRISTIAN SCI. MONITOR, Nov. 3, 1992, at 6.

292. Damrosch, *supra* note 287.

peace.²⁹³ In light of rising ethnic and religious sensitivities, the possibility of regional instability and fomenting disturbances in other States may also legitimately make a particular situation a "danger" or "threat" to the peace.

The situation in Bosnia-Herzegovina represents the extreme case of an internal conflict that is fraught with outside intervention and has the potential to trigger a major international conflagration.²⁹⁴ The predicament in Bosnia is partly due to the excruciatingly painful breakup of the State of Yugoslavia. This has been compounded because Yugoslavia is comprised of multiple ethnic groups with a long, turbulent, and sometimes violent history. Bosnians hail from three ethnic groups, two of which, Serbs and Croats, do not want to be minorities in a multiethnic State and have loyalties to the adjoining States of Yugoslavia and Croatia, where their ethnic groups are based. Consequently, intervention by another State, however surreptitious, was almost assured.

The remaining group, Bosnian Muslims, have aroused the support of Muslim States on religious grounds, raising the possibility of additional intervention.²⁹⁵ There have been massive human rights abuses, which have included rape camps, concentration camps, and massive bombardments of civilian targets. Moreover, the length and intensity of the conflict has caused unrest in a region which is already unstable because of the fall of communism and the rise of many new and sometimes unstable republics. Additional fighting in Macedonia was determined to be enough of a possibility that U.N. troops were deployed in that State.²⁹⁶ A major conflagration in Kosovo has been actively discussed;²⁹⁷ this could bring in additional countries, such as Albania, Greece, and Turkey.

The situation in Bosnia-Herzegovina has all of the elements of a

293. For example, increasing intensity may lead to severe human rights abuses. Human rights abuses alone, or in combination with increasing size, may lead other States to want to intervene.

294. Some have termed this an international war because of outside intervention by Croatia and Yugoslavia. This is correct given the admission of all of these nations to the United Nations. But the wars in Croatia and Bosnia are also part and parcel of the breakup of Yugoslavia, which partly explains the initial hesitation by the Security Council to become involved at all.

295. Wolfgang Danspeckgruber, *Balkan Web: Unraveling A Region's Tangled History: The Alliances That Make Peacekeeping Perilous*, WASH. POST, May, 9, 1993, at C4; *Iran Offers Help to Bosnian Muslims*, CHRISTIAN SCI. MONITOR, Nov. 6, 1992, at 2; Peter Grier, *West Downplays Iran's Bid to Send Troops to Bosnia*, CHRISTIAN SCI. MONITOR, July 16, 1993, at 2.

296. R.C. Longworth, *U.S. Troops Face Unique Role: Mission in Macedonia is "Preventive Deployment"*, CHICAGO TRIB., June 15, 1993, at 7; *300 U.S. Troops in Macedonia to Try to Contain Balkan War*, N.Y. TIMES, July 13, 1993, at A10.

297. Roger Cohen, *Fear of The Serbs Spreads in the South*, N.Y. TIMES, May 30, 1993, at D5; Paul Lewis, *U.N. Near Accord on Plan to Watch Serbian Frontier*, N.Y. TIMES, May 13, 1993, at A1; Bujar Bukoski, *Kosovo's Plea for Help*, CHRISTIAN SCI. MONITOR, June 30, 1993, at 19.

potential powder keg of major proportions. It presents a classic case of an internal conflict that is a grave "threat" to international peace and would suggest the kind of situation where the Council could act to the very limits of its powers, including forcible and nonforcible enforcement.²⁹⁸

On the other hand, there is Somalia, truly an horrific situation, that is characterized by anarchy and massive human rights abuses in that the population is being denied access to food, medicine, and other relief supplies. Undoubtedly, this makes the situation of international concern. Moreover, the outflow of refugees is another international effect and this spillover also makes it of international concern. What is not clear is what makes it a "threat" to the peace. In December 1992, the Security Council authorized the use of force in order to effect the delivery of humanitarian assistance in Resolution 814.²⁹⁹ No impact upon the region was specifically mentioned in the Resolution. During the debates on the Resolution, States mentioned the danger to regional stability and the refugee problem.³⁰⁰ Yet it did not appear that refugees were causing other States to contemplate intervention.³⁰¹ Nor did it appear that Somalis were attacking other States. It also did not seem to be the kind of situation which "makes men's blood boil," as in South Africa and Rhodesia, where racist policies inflamed the passions of surrounding African nations, who eventually gave aid and comfort to resistance movements. Nor was the situation causing instability in surrounding States.³⁰² Given no present or

298. To date, the Security Council has passed 38 resolutions on Bosnia and Hercegovina alone. It has deployed peacekeeping forces, see S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg. at 2, U.N. Doc. S/RES/743 (1992), and imposed a mandatory embargo against Serbia. Yet in the initial stages of Security Council involvement in Yugoslavia, where it addressed the situation in Croatia, there was some debate over whether this was an internal matter, within the domestic jurisdiction of Yugoslavia. A number of States specifically cited the request of the government of Yugoslavia as a basis for taking up the matter. See U.N. SCOR, 47th Sess., 3009th mtg. at 28, 36-38, U.N. Doc. S/PV.3009 (1992). While Regional efforts to resolve the situation were ongoing, the potential for major and grave regional consequences were well known. See Weller, *supra* note 46, at 579.

299. See *supra* notes 26, 185-87 and accompanying text. Acting under chapter VII, Resolution 814 authorized the use of all necessary means to establish as soon as possible a secure environment for humanitarian relief operations.

300. S/PV.3145, *supra* note 188, at 19-20 (Cape Verde's statement regarding stability of the region), 33 (United Kingdom's statement regarding refugees).

301. A later report by the Secretary General does mention some of the pressures on neighboring States caused by an influx of refugees.

302. There have only been hints of the impact the situation in Somalia is having on neighboring States. For instance, in his report of January 26, 1993, the Secretary General referred to growing concern over the movement of technical personnel into border areas with Kenya and Ethiopia. The problems created by armed gangs in refugee camps in Kenya had prompted authorities to threaten to expel Somali refugees residing in that country. He noted the destabilizing effect of such movements into these countries and the threat they pose for any future stability in Somalia and concluded that they are matters which must be addressed. *The*

threatened direct transborder military effects, the "threat" to the peace had to be found elsewhere.³⁰³ It appears, therefore, that the humanitarian crisis in and of itself was the "threat" to the peace in Somalia.³⁰⁴ This is indeed an expanded definition of "threat" to the peace.

Haiti took this expansion a step forward. Here the Security Council found a "threat" to the peace and ordered mandatory sanctions until a settlement was reached on restoring Aristide to power.³⁰⁵ While the region has responded to the coup against Aristide en masse, it has been accomplished peacefully through the use of economic sanctions. There have been no intimations that any State contemplates military or any other kind of intervention in Haiti. Nor is the Haitian regime threatening its neighbors. There were human rights abuses, but they were not the focus of the Resolution and, while serious and not to be minimized, they certainly were not on the level of those in Somalia.³⁰⁶ While there has been a large exodus of refugees from Haiti, it has been mainly to the United States, which is neither likely to invade Haiti for this reason nor to experience instability from the influx.³⁰⁷ Consequently, the finding of a "threat" to the peace seems to have been the existence of the regime itself. This is quite a startling conclusion given that the government has threatened none of its neighbors. This suggests that "threat to the peace" is almost

Situation in Somalia: Progress Report of the Secretary-General, U.N. SCOR, 48th Sess. at 8, ¶ 45, U.N. Doc. S/25168 (1993) [hereinafter *Progress Report of the Secretary General* S/25168]. In determining the deployment of UNOSOM II, he recommended that Somalia's borders be included for the purpose of controlling the movement of refugees, to prevent the illicit introduction of arms into Somalia and to avoid destabilization of neighboring countries. *Report of Secretary-General S/25354*, *supra* note 186, at 21, ¶ 97. Whether this situation rises to a "threat" to the peace is at the least debatable.

303. The Secretary General acknowledged that the situation in Somalia was primarily of a domestic nature, but he observed that it could affect the peace and stability of the entire region of which Somalia forms an integral part, unless energetic and timely action is taken to avert a major humanitarian and security disaster. *Report of the Secretary-General S/25354*, *supra* note 186, at 22, ¶ 97.

304. In his recommendations on the mandate of UNOSOM II, the Secretary General sought authority for appropriate action, including enforcement action as necessary, to establish throughout Somalia a secure environment for humanitarian assistance. *Report of Secretary-General S/25354*, *supra* note 186, at 22. It also would empower UNOSOM II to provide assistance to the Somali people in rebuilding their shattered economy and social and political life, reestablishing the country's institutional structure, achieving national political reconciliation, recreating a Somali State based on democratic governance and rehabilitating the country's economy and infrastructure. *Id.*

305. See *supra* note 33 and accompanying text.

306. The Resolution noted, with concern, the humanitarian crisis, which included the mass displacement of populations, which was aggravating the threat to the peace. S.C. Res. 841, *supra* note 27.

307. The United States has permitted few Haitians to enter the United States, contending that they are economic rather than political refugees. While this position has spurred some debate, sparked a few demonstrations against U.S. policy, and generated court challenges, it certainly has not led to internal instability.

incapable of definition at this point, although it is notable that the use of force was not authorized to implement the embargo.³⁰⁸

Haiti was defined as a unique and exceptional situation warranting extraordinary measures by the Security Council in support of the efforts undertaken within the framework of the OAS.³⁰⁹ The Council determined that in these unique and exceptional circumstances, the continuation of this situation threatened international peace and security.³¹⁰ But as former Secretary General Javier Perez de Cuellar has noted, a principle invoked in a particular situation, but disregarded in a similar one, is as good as no principle at all.³¹¹ While Haiti can be distinguished as a unique attempt to assist regional efforts, it does contribute to difficulties in determining the parameters of "threat" to the peace.

Both of these situations differ from the Kurdish crisis in Iraq. There, the Iraqi suppression of the rebellion was found to be a "threat" to the peace.³¹² But this finding was made against the backdrop of a massive exodus of refugees from an ethnic group that forms a large and restless minority in the surrounding States to which the refugees were fleeing. That a massive inflow of such refugees could cause difficulties with minorities within these States is quite plausible. Moreover, border incursions had taken place and massive numbers of military personnel were in the area in the aftermath of a devastating war; tensions were high. A finding of a "danger" or "threat" to international peace is much more plausible in these circumstances. It is also notable that even in this volatile situation, the use of force was not specifically authorized.

Resolution 688 was relied upon, however, to carry out *military* measures. This reliance is clearly misplaced, and went beyond the text of the Resolution and probably beyond what most members who voted in its favor contemplated. In August 1992, the United States and its allies established a no-fly zone over Southern Iraq, allegedly to protect portions of the Iraqi population from repression by the government of Saddam

308. Measures to enforce the embargo militarily were omitted because of objections by Brazil and other Latin American States. *Brazil Prolongs Haiti's Agony*, N.Y. TIMES, June 16, 1993, at A26.

309. The Council relied upon the request of the Permanent Representative of Haiti, and took action within the context of related actions previously taken by the OAS and the General Assembly of the United Nations.

310. It seems that Haiti's chronic instability, by generating waves of refugees, affected regional stability. Howard W. French, *U.N. Approves Ban on Shipments of Oil to Haitian Military*, N.Y. TIMES, June 17, 1993, at A1; Peter Pringle, *Haiti Faces Worldwide UN Oil Embargo*, INDEPENDENT (London), June 17, 1993, at 13. Human rights abuses had led to an exodus of people and consequent destabilization of the region.

311. *Secretary General's Address at the University of Bordeaux*, *supra* note 3.

312. S.C. Res. 688, *supra* note 28.

Hussein.³¹³ These countries relied on Resolution 688 for authority, claiming that the Resolution demanded that Hussein end the repression of the Iraqi people, and hence, individual countries were permitted to enforce the Resolution.³¹⁴ Given that there is no mention of chapter VII in the Resolution and no authorization to use force, this interpretation is questionable at best.³¹⁵ Opposition and misgivings over the no-fly zone centered on the dismemberment of Iraq and resulting regional instability,³¹⁶ as well as violations of the territorial sovereignty of Iraq.³¹⁷

6. The Need for Standards

The preceding case studies indicate a need for delineating some standards for determining if there is a "threat" to the peace, whether they expand past definitions or adherence to past practice.³¹⁸ The supreme function of the Security Council is to maintain international peace and security and this should form the first question asked — is a particular situation a "danger" or "threat" to international peace and security; the distinct possibility that it is neither must be included in this assessment.³¹⁹

313. John H. Cushman Jr., *Saudis in Supporting Role to Allied Flights Over Iraq*, N.Y. TIMES, Aug. 30, 1992, at A10; Caryle Murphy, *U.S. Planes Begin Missions Over Iraq: Enforcement of 'No-Fly Zone' Starts Without Resistance*, WASH. POST, Aug. 27, 1991, at A1; Michael Wines, *U.S. and Allies Say Flight Ban in Iraq Will Start Today*, N.Y. TIMES, Aug. 28, 1992, at A14.

314. *Excerpts from Bush's Talk: Iraqi Air Zone is Off-Limits*, N.Y. TIMES, Aug. 27, 1992, at A14.

315. The only remotely plausible case to be made is the finding of a threat to the peace arising from the consequences of the repression, and the demand for access by humanitarian workers. But chapter VII is conspicuously absent and, at the very least, there should be an explicit authorization to use force of any type. The general U.N. expression is to give authorization "to use all necessary means." This authorization is explicit in previous resolutions regarding Iraq and subsequent resolutions on Somalia and Bosnia-Herzegovina.

316. Gerald Butt, *Former Gulf War Allies Give Lukewarm Response to West's Stand on Iraq*, CHRISTIAN SCI. MONITOR, Aug. 28, 1992, at 1; Lucia Mouat, *Behind the No-Fly-Zone Strategy: Dwindling Coalition Against Iraq*, CHRISTIAN SCI. MONITOR, Sept. 1, 1992, at 1; Tony Walker, *Iraq Warns Arabs of Retaliation over "No Fly" Zone*, FIN. TIMES (London), Aug. 28, 1992, at 3.

317. Michael R. Gordon, *Warning to Baghdad: The Shiites are Iraqis First, Not Separatists*, Experts Say, N.Y. TIMES, Aug. 27, 1992, at A14; Claude Van England, *Iran Welcomes Plans to Protect Shiites, But Blasts Partition*, CHRISTIAN SCI. MONITOR, Aug. 25, 1992, at 3.

318. Of course, these are just suggested guidelines. It is up to the Security Council to make this determination under articles 39 and 37 and it must be afforded some flexibility in this task.

319. The assumption is usually that intervention will undoubtedly improve the situation, but this is not inevitably the case. Practically, military force may not be an effective instrument against most kinds of human rights violations. Mass intra-State violations may be less amenable to military solution than past U.N. military operations which involved measures such as acting as a buffer force between opposing States. Moreover, violators are often the military and thus the interposition of another army (the United Nations) could be counterproductive. Damrosch, *supra* note 287, at 220-21; Stephen J. Stedman, *The New Interventionists*, FOREIGN AFF., Dec. 1992 (America and the World 1992/93 issue), at 1.

This is a difficult and highly political question to answer. Yet a factual investigation of the situation, including consultations with surrounding States, would assist in making this finding.³²⁰ How the matter comes before the Security Council may be telling. For instance, if States in the region are requesting mediation or assistance, this may indicate an international impact that is a "danger" to the peace. Similarly, if the Secretary General believes it may be a "danger" to the peace and warrants investigation, this would indicate that there is some reason to consider it for chapter VI measures. On the other hand, if it is only the State concerned or an internal faction, this may indicate that it is not a "danger" or "threat" to the peace.

While it is highly unlikely, if an investigation reveals that a situation is unquestionably internal and not affecting surrounding States in a way that makes it possible that inter-State violence will erupt, the conflict should be resolved by the State involved, with the assistance of the Secretary General if desired.³²¹ Peaceful dispute settlement mechanisms can be made available in the case of any breach of the peace, whether it is international or internal, at the option of Member States or insurgent factions, although presumably there would be opposition to such a prerogative in favor of rebel factions if the matter is unquestionably internal.³²²

A request for conciliation or mediation would not constitute interference in the domestic affairs of a State if it occurs with the consent of all the parties involved, because in the absence of other Charter prohibitions, consent vitiates domestic jurisdiction objections. Problems arise if one party refuses to take part while the other desires assistance in resolving the situation. This becomes more complex when a rebel group seeks assistance in reaching a settlement with an established government.³²³ In the absence of even a "danger" to the peace, the Security

320. It seems advisable to investigate, because the earlier peaceful settlement measures can be utilized, the better. It makes sense to strengthen and broaden the investigatory organs of the United Nations and the General Assembly appears to believe this is a useful step. *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security*, G.A. Res. 46/59, U.N. GAOR, 46th Sess., Annex, Supp. No. 49, at 290, U.N. Doc. A/46/49 (1991).

321. The General Assembly might also have a role if it is of international concern. The mediation and conciliation mechanisms available through the Secretariat, however, might be more useful.

322. While utilizing these dispute settlement mechanisms at the option of Member States may not be objectionable, such an option at the disposal of opposition factions, such as ethnic minorities desiring secession, probably would be.

323. Such would have been the case if, for instance, the students at Tienanmen Square had requested U.N. assistance in their uprising against the Chinese government. If the Chinese government refused, and relied upon article 2(7), it is unlikely the United Nations would prove useful.

Council would clearly have no jurisdiction. In the absence of international concern or some "danger" to the peace, it is doubtful that other organs would assume jurisdiction in any meaningful manner if the affected State opposed it.³²⁴

If an internal threat is not even a "danger" to the peace, the Security Council would have no jurisdiction under the present U.N. Charter. But given the broad manner in which the more weighty term "threat" to the peace is being defined, it is likely that many conflicts will be found to be at least a "danger" to the peace. The Council, in its discretion, can simply find a "danger" to the peace, given that the term is not defined in the Charter and has been broadly interpreted.³²⁵ What constitutes a "danger" to the peace is a flexible concept but would seem to encompass serious disputes, international friction, or situations in which a large enough number of States (especially those in the affected region) view it as a matter of grave international concern.

Given Security Council findings in Somalia, and especially Haiti, almost all internal strife can probably be termed a "danger" to the peace. Because of the wide range of useful options available here, a consensus is likely to emerge that brings most internal conflicts within this category, especially given the expanding definition of "threat" to the peace. Moreover, because chapter VI jurisdiction is dependent on consent and consists of recommendations, few would see article 2(7) as a barrier.

While article 2(7) would not bar Security Council jurisdiction, it should shape what action is ultimately taken. The Security Council should limit measures to ensuring that the potential for a "threat" to international peace is not realized. Particular attention should be paid to the reactions and actions of States in the region and, where appropriate and useful, assistance by regional organizations should play a prominent role.³²⁶ Security Council and Secretary General measures might include conciliation, mediation, good offices, and other forms of peaceful settlement as well as recommendations to other States not to interfere in the dispute.

324. The General Assembly might pass resolutions, as it did during the initial stages of the Haitian debacle. Moreover, regional organizations might play a pivotal role as did the OAS in Haiti.

325. See *supra* notes 269–80 and accompanying text.

326. It should be clear that this course of action takes place with the free will of the parties, and the parties must be in agreement as to support from the appropriate regional organization acting in place of the United Nations. The Charter provides for the input of regional organizations in chapter VIII. U.N. CHARTER ch. VIII. Some regional organizations may be dominated by a particular regional power and thus may not be honest brokers in potential disputes. Further, some regional organizations are comparatively weak and not able to assist in many disputes. On the other hand, the Council has left some conflicts primarily to regional groups, such as the civil war in Liberia.

If all of the parties agree and give their consent, the introduction of peacekeeping forces would be permissible if the situation were ripe for such forces.³²⁷

Non-State parties should also be permitted to appeal to the Organization for assistance. Including non-State parties would be in accord with the evolution towards increasing the rights of individual and non-governmental entities on the international stage.³²⁸ Since the ultimate objective is to settle disputes peacefully, efforts should be made not only to include all relevant parties, but to permit any party desiring a peaceful settlement to appeal to the United Nations.

Affording non-State parties access to U.N. proceedings is not without precedent. Rule 39 of the Rules of Procedure of the Security Council permits the Council to invite "other persons" to supply information or give assistance. During the first twenty-five years of the Council's deliberations few groups testified. But beginning in 1971, liberation movements have been invited to participate in debates on issues directly concerning them.³²⁹ In 1972, this concept was widened and now includes anyone whom the majority of members wish to hear.³³⁰ Support for national liberation movements led to attempts to confer some of the benefits of the international legal system upon national liberation groups.³³¹

327. This would mean some of the parties have or are close to a settlement and assistance is needed in its implementation. At a minimum, the fighting must have stopped, because peacekeeping forces do not have the authority to use force. Generally, they have been employed to patrol borders, keep factions apart, and monitor cease fires. *BLUE HELMETS*, *supra* note 3, at 4-5.

328. John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L. J. 535, 538-40 (1993). In the postwar era, the scope of international law expanded from nation States to international and regional organizations, and then increasingly to persons, whether as individuals or corporations. The rights of the individual have expanded most markedly in the human rights arena. *Id.* Individuals can, in some instances, bring individual claims for human rights violations before international committees. See generally GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (Hurst Hannum ed., 2d ed. 1992). Admittedly, this is only permitted if a State gives its consent by adopting optional protocols to the instruments according these rights. Sian Lewis-Anthony, *Treaty-based Procedures for Making Human Rights Complaints Within the U.N. System*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra*, at 41-2, 49, 52. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. 16316 (1966).

329. SYDNEY DAWSON BAILEY, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 138-39 (1988).

330. *Id.* at 139. This has included a variety of organizations, such as the League of Arab States, the Pan Africanist Congress, the African National Congress, the South West Africa People's Organization, and others. Individuals have included mayors, clerics, and politicians. *Id.*

331. Hargrove, *supra* note 70, at 113, 123. In 1975, Egypt asked that the Palestine Liberation Organization (PLO) be invited to participate. The invitation conferred on the PLO the same rights of participation conferred when a Member State is invited to participate. The United States opposed the invitation and some have questioned whether it was in accordance

Moreover, previous U.N. efforts to mediate conflicts have included nonrecognized groups which are parties to a conflict, such as leaders of rebellious groups, exercising de facto control over a region, or rival claimants to central government authority.³³² This practice has probably been facilitated by the General Assembly and Security Council practice of receiving statements of nongovernmental leaders or nonrecognized authorities with the understanding that there are no implications as to recognition.³³³ Because recognizing and legitimizing insurgents may be problematic in soliciting State cooperation, this can be ameliorated by explicitly acknowledging that including such parties in negotiations in no way prejudices the final outcome of the political settlement. While this solution will be of limited usefulness if the affected State vociferously objects, it may bring parties to the table, if for some reason the government does not take this step or if there are questions regarding who actually governs.

At the next level, a "threat" to international peace and security, the Security Council unquestionably has jurisdiction and has more means at its disposal to deal with the matter at hand.³³⁴ In determining whether there is a "threat" to the peace, the impact of the situation on surrounding States should be considered. Incursions by armed forces across borders, massive outflows of refugees which cause unbearable tensions in surrounding States, the stirring of ethnic or other tensions in neighboring States, the threat or actuality of outside intervention in response to human rights abuses or for other reasons, and regional or more extensive geopolitical effects would all seem to be determinative. The immediacy of these events might also be a factor to distinguish between potential and actual "threats" to the peace. Bosnia-Herzegovina appears to be the classic case of an internal war that is a "threat" to international peace and security; it possesses all of the aforementioned elements. Haiti, on the other hand, possesses few and truly represents a broader use of the term.

Of course, if there is a "threat" to the peace, the Security Council can mandate or recommend appropriate measures.³³⁵ Except in the most dire

with the spirit or letter of the Rules of Procedure. BAILEY, *supra* note 329, at 131. RICHARD KIRGIS, *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* 170-75 (2d ed. 1993).

332. Schachter, *U.N. & Internal Conflict*, *supra* note 4, at 427.

333. *Id.*

334. Consent is no longer a legal issue because the Council may be taking mandatory decisions. Consent may still be useful, both practically and politically. Still, it is when consent is not forthcoming that the Council is more likely to find a threat, versus a danger, to the peace.

335. For instance, the Council might call for provisional measures which attempt to halt the fighting and give the parties an opportunity to work out their differences. It might also decide that all States are to refrain from intervention of all kinds, and to channel all responses from the international community through the Council. If circumstances warrant, nonforcible

situations, however, a settlement should not be imposed. To force a settlement upon warring factions might undermine other Charter provisions, such as the right of self-determination,³³⁶ and the sovereignty and political independence of States.³³⁷ Moreover, in the long run it may be untenable and not contribute to lasting peace. Of course, in some circumstances, a temporary ceasefire or imposition of peace may be desirable and necessary because of the impact of the situation on the region. A particular party may block those efforts and in those circumstances, a settlement might be imposed. This might be the case in Bosnia-Herzegovina, where the war is having a severe impact on the region, and with respect to General Aidid in Somalia.

The most difficult questions arise with the introduction of forces without the consent of the parties involved, and with the authority to use force.³³⁸ These are really enforcement actions and should be treated accordingly. If the international community truly believes there is a distinction between peace enforcement and chapter VII enforcement, these distinctions should be resolved.³³⁹ Peace enforcement involves the use of force against a State or against warring factions that are trying to assume the power of the State. Moreover, unlike traditional peacekeeping, it is imposed without consent. It is possible to either continue to stretch the concept of self-defense or to make distinctions as to whether it is the use of force against a State.³⁴⁰ Rather, these decisions should be made under chapter VII because they have enormous consequences and, even in this

measures might be employed first, such as an arms or general embargo against the State where the situation is centered, or against other States that are exacerbating the situation or refuse to desist. In addition, all of the peaceful settlement mechanisms of the Organization should be put at the disposal of the parties.

336. While the "peoples right to self-determination" is a concept in the midst of reformulation, the cries for independence emanating from various groups cannot be ignored despite the perceived need for stability and territorial sovereignty. To do so only postpones, not solves underlying demands. In these circumstances, perhaps we must sometimes permit some breaches of domestic peace, albeit with limits, such as when it involves massive human rights violations and the like.

337. It would seem that it is up to internal forces to decide the government and its form, as well as issues of secession.

338. This has been defined as peace enforcement by the Secretary General, who postulated that authority for such forces might be found in article 40. BOUTROS-GHALI, *supra* note 10.

339. It would seem that, with peace enforcement, the use of force is authorized, although not the primary component, whereas in enforcement it plays a more prominent role. Enforcement includes nonforcible measures and thus peace enforcement could easily be included in chapter VII. Peacekeeping has always required the consent of all of the parties, and force is authorized only in self-defense.

340. MURPHY, *supra* note 62, at 17. This distinction was employed in the Congo. Since force was authorized against an internal faction, it was not the use of force against a State. See Advisory Opinion, Certain Expenses of the United Nations, 1962 I.C.J. 151 (July 20). Self-defense was also stretched beyond recognition.

veto-free post-Cold War era, are undertaken only after a great deal of thought, discussion, and debate. In order to impose peace enforcement, the debate should take place on the same level as when the Organization undertakes enforcement, and the necessary forces should have the requisite support, authority, and direction to actually carry out the mandate of the Council.

This necessarily entails some degree of consensus, at least among the fifteen members of the Security Council, and a studied consideration of the situation before it. It should also include direction from the Council as to what actions should be undertaken, and the input of the entire Council in carrying out the mandate.³⁴¹ Requiring the invocation of chapter VII, where States are more hesitant, would help ensure that there is consensus for action. This requirement combined with permanent U.N. forces under U.N. command, would move the Organization towards multilateral action. This may portend inaction by the Council in certain situations or perhaps lesser forms of action. There may, however, be more consensus than might be imagined. That the Council invoked the mandatory measures of chapter VII in setting up UNOSOM II indicates that the trend is in this direction.³⁴²

III. A MORE DEMOCRATIC SECURITY COUNCIL

Some observers have described the post-Cold War world as presenting a "new world order," a term that has been given different interpretations by scholars, government officials, and news commentators.³⁴³ It could be defined as a new international system versus the Cold War system which no longer exists; or, it could signify a new form of conflict management in which the United Nations figures predominantly.³⁴⁴ The conflict management paradigm could denote U.S. hegemony, Security Council hegemony, or true multilateralism led by all organs of the United Nations.³⁴⁵ Under the multilateral approach, the United Nations would not merely be an instrument of U.S. foreign policy or the policies of the

341. See *supra* text accompanying note 47.

342. *Report of Secretary General S/25354*, *supra* note 186, at 12-13, ¶¶ 56-57.

343. Arend, *supra* note 217.

344. *Id.* at 491.

345. *Id.* at 494-95. An example of U.S. hegemony would be the Gulf War where the United States was a commanding leader. Professor Arend has termed Security Council hegemony, or more precisely, permanent member hegemony, the concert of Great Powers. An example of this is the concurrence of the other permanent members in the Gulf War, the settlement of the Cambodian conflict, and that they have acted as an executive committee. *Id.*; see also W. ANDY KNIGHT & MARI YAMASHITA, *THE UNITED NATIONS' CONTRIBUTION TO THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 40-43 (York Centre for International and Strategic Studies, 1992).

permanent members, but rather would be an instrument of dispute settlement where each organ plays an appropriate role.³⁴⁶ States would see the United Nations as a proper forum to address international conflicts; the Organization would have a revived legitimacy.³⁴⁷ The next Part discusses the mechanisms that will help ensure that broad support and a degree of consensus and legitimacy, rather than unadulterated power, drive the Council's decisions.³⁴⁸

In *An Agenda for Peace*, Secretary General Boutros-Ghali stated:

a genuine sense of consensus deriving from shared interests must govern the work of Council, not the threat of a veto or the power of any one group of nations. Moreover, the permanent members must have the deeper support of other members of the Council, and the membership more widely, if the Council's decisions are to be effective and endure.³⁴⁹

This raises a number of issues, such as including more varied voices in the decision-making process, articulating shared interests and values, and ensuring that the interests of one or only a few States do not control. A number of changes will be needed to address these concerns.

A. A More Open and Consistent Decision-Making Process

There have been charges from some quarters that the Security Council and the United States are synonymous. The issue of U.S. dominance³⁵⁰ arises from several measures the Council has taken, predominately in Iraq and Libya,³⁵¹ and the concomitant lack of action against U.S. allies, such

346. Arend, *supra* note 217, at 495; BOUTROS-GHALI, *supra* note 10.

347. Arend, *supra* note 217, at 495.

348. There are political obstacles to some of the reforms suggested here, but this should not prevent us from exploring the possibilities. Especially in this rapidly changing world, it is conceivable that current political obstacles will unexpectedly dissipate and, as the preceding discussion illustrates change is in the air. The author agrees with Sir Brian Urquhart who cautions against the realists and notes that pragmatic dreams, in the long run, are probably the most practical form of common sense. Brian Urquhart, *After the Cold War: Learning from the Gulf*, in TOWARD COLLECTIVE SECURITY: TWO VIEWS 7 (Thomas J. Watson, Jr., Institute for International Studies, 1991). Professor Thomas Franck notes that realists have been remarkably unrealistic in their appraisal of prospects for systematic transformation. Thomas Franck, *Intervention Against Illegitimate Regimes*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 30, at 159, 167 (1991). Most of the ideas outlined here are sufficiently pragmatic in the current international milieu.

349. BOUTROS-GHALI, *supra* note 10, at 15, ¶ 78.

350. See Paul Lewis, *In Tune Now, U.N.'s Quintet Plays Themes Penned in '45*, N.Y. TIMES, Jan. 3, 1993, at A5, which notes the discomfort of some countries over both U.S. dominance in the Security Council and the receding frontiers of national sovereignty.

351. See Arend, *supra* note 217; Paul Lewis, *U.N. Again Warns Iraq on Cease Fire*, N.Y. TIMES, Mar. 13, 1992, at A1, A12; Paul Lewis, *Isolation of Libya Grows as its Links to World*

as Israel. Some U.S. commentators have gladly proclaimed the new age of unchallenged U.S. power and dominance, with only a few cautions against "imperial temptation."³⁵² That the United States has often taken the lead role in military actions lends additional credence to these assertions.³⁵³

To counter this perception, Security Council decisions must be viewed as fair, consistent, evenhanded, and in accordance with international law and the U.N. Charter.³⁵⁴ To begin with, specificity in Security Council resolutions would be useful.³⁵⁵ By indicating more specifically the basis for a particular outcome in a particular case, norms will begin to emerge on such issues as what constitutes a "threat" to the peace. It would also be helpful if Council members articulated their views on the record,³⁵⁶ as well as solicited and incorporated the views of other interested States and organizations.³⁵⁷ Again, this would help in beginning to define the parameters of various terms such as "danger" to the peace.

As norms develop, they must be applied consistently. Thus, human rights violations and internal conflicts in Northern Ireland,³⁵⁸ Tibet,³⁵⁹ and

Are Cut, N.Y. TIMES, Apr. 16, 1992, at A1, A10; Julian Oزانne, *Quaddafi Regime Seen as Least of Many Evils*, FIN. TIMES (London), May 28, 1992, at 4.

352. Compare Lewis, *supra* note 350, with ROBERT W. TUCKER & DAVID HENDRICKS, *THE IMPERIAL TEMPTATION* (1992).

353. Steven A. Holmes, *U.S. May Send Commanders To Hunt for Somali Warlord*, N.Y. TIMES, Aug. 11, 1993, at A1, A2; Daniel Williams, *U.S. Troops to Remain in Somalia*, WASH. POST, Aug. 11, 1993, at A1, A16.

354. That international treaties and obligations were ignored in the case of Libya, made this case especially difficult. Weller, *supra* note 4. See also Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3 (Apr. 14).

355. Many resolutions do rely upon more detailed Secretary General reports. These reports, however, often do not indicate why, for instance, chapter VI versus chapter VII applies.

356. Thus, the practice of the permanent members acting as a private club taking decisions in private would have to end.

357. The Security Council routinely hears the views of Member States and regional organizations that have a particular interest in the matter. U.N. CHARTER arts. 31, 32; BAILEY, *supra* note 329, at 33, 395 (discussing Rule 39 of the Rules of Procedure).

358. See Myers, *supra* note 4, at 89-110.

359. Tibet is in the Himalayan region of Western China. It was first brought before the United Nations when, after the birth of the People's Republic of China, the Tibetan ruler, the Dalai Lama, demanded (October 7, 1950) a U.N. protectorate over the region. The U.N. General Assembly General Commission refused to interfere in internal Chinese affairs. Rather, the Commission hoped for a peaceful Chinese solution of the problem, and an agreement was signed between the Dalai Lama and Mao-Tse-Tung on May 23, 1951. The matter was brought before the United Nations again after the Dalai Lama fled to India in March 1959. On October 21, 1959, The General Assembly adopted Resolution 1533 calling for respect for the basic rights of the Tibetan people, which was confirmed by Resolution 1723 of December 20, 1961, and Resolution 2079 of December 18, 1965. In 1984, China invited the Dalai Lama to visit Peiping. EDMUND J. OSMANCZYK, *ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS* 801 (1985).

Tiananmen Square³⁶⁰ must be appropriate matters for the Security Council if it is determined that internal conflicts involving grave human rights violations are “dangers” or “threats” to the peace, warranting Security Council intervention.³⁶¹ Resolutions must be enforced against allies and enemies of Security Council members.³⁶² Once particular norms are deemed to apply and resolutions are promulgated, resolutions must be evenly and consistently enforced. Selective enforcement by the Security Council, especially when it involves the use of force, will undoubtedly raise questions about motives.³⁶³

As Charter parameters evolve, there must be consensus on the norms which emerge. This can be achieved in several ways. General Assembly resolutions and declarations could be useful and instructive. Their non-binding nature means they would not tie the hands of the Council in any particular case.³⁶⁴ Yet attempting to hammer out norms and expectations would permit and stimulate discussion by the entire international community on what the law is or should be.

B. A Larger and More Diverse Security Council

A number of commentators have been asserting a right to internal democracy.³⁶⁵ Perhaps this notion of democracy might be applied to the Security Council. More diverse views would be incorporated into the decision-making process if the Council had permanent members representing additional regions of the world.³⁶⁶ The five permanent members were given permanent seats because of their international status following

360. Robert D. McFadden, *The West Condemns the Crackdown*, N.Y. TIMES, June 5, 1989, at A12; Daniel Southerland, *Beijing Residents Resist Army Occupation*, WASH. POST, June 5, 1989, at A1; Robert Thompson, *Deng passes into history with blood on his hands*, FIN. TIMES (London), June 5, 1989, at A3.

361. Of course, this calls into question the veto, which seems to be the ultimate exercise of sovereignty. It does seem to be disingenuous to assert that sovereignty is shrinking for all except those with the power to continue to assert it with the veto. It also seems to indicate, despite protestations to the contrary, that might does make right.

362. The different standards applied to Israel and Iraq raise questions of legitimacy.

363. With Iraq, it appeared that the United States was using the Council to carry out its foreign policy aims.

364. See *Declaration on Friendly Relations*, *supra* note 31; *Declaration on Granting Independence*, *supra* note 110.

365. Franck, *Illegitimate Regimes*, *supra* note 348, at 163. Professor Franck contends that there is an emerging right of the citizens of Member States to participate in their national governance and this right will be guaranteed by the international community as a global entitlement.

366. See *Question of equitable representation on and increase in the membership of the Security Council*, U.N. GAOR, 46th Sess., 68th mtg., Item 38, at 2, U.N. Doc. A/46/PV.68 (1991).

World War II.³⁶⁷ This exalted stature and the continued possession of the veto power over Security Council decisions is now an anachronism for some,³⁶⁸ and does not accurately reflect current global distributions of military and economic power. While military prowess was originally one of the major defining characteristics, present threats to the peace tend to be more local and to have their roots in poverty and deprivation. Thus, it may make sense to consider placing regional and economic superpowers on the Council.³⁶⁹

With the absence of permanent voices for larger powers from the developing world,³⁷⁰ there is a risk that Council decisions will not adequately take into account the concerns of those countries.³⁷¹ Thus the calls, that have grown into a chorus, for recomposition of the Security Council can no longer be ignored. A reconfigured Security Council where the views of more diverse segments of the international community are represented could be a crucial element in ensuring that Council decisions are deemed legitimate by Member States.³⁷² While there have been frequent calls to add specific countries to the Council,³⁷³ one way to avoid the current situation, of Council Members no longer possessing the requisite international standing, is to add regional seats which would go to the largest power in the region. Population, wealth, and other factors

367. White, *supra* note 37, at 4–5. For a further discussion of the influence of these States on the development of the United Nations, see CLAUDE, *supra* note 9, at 62–73.

368. Frequent questions have been raised regarding whether France and the United Kingdom should retain permanent seats. The weak economic status of the Russian Federation might also raise questions if it is unable to help fund necessary operations. It does, however, remain a major military power with an immense nuclear arsenal.

369. Paul Lewis, *U.S. to Push Germany and Japan for U.N. Council*, N.Y. TIMES, June 13, 1993, at A5. There have been many questions raised as to whether Germany and/or Japan, two economic giants, should have permanent seats. The United States supports their inclusion. *Id.*; see also *Reapportion the Security Council*, N.Y. TIMES, June 29, 1993, at A14; Michael Littlejohns, *U.S. Backs Japanese, German U.N. Bid*, FIN. TIMES (London), July 2, 1993, at 5. The regional powers most often mentioned are Nigeria, India, and Brazil. Lewis, *supra* at A5.

370. Many of the current members of the United Nations were not States in 1945 and no consideration was given to the geographic, racial, ethnic, or cultural representation of permanent members.

371. The permanent membership of the Council is heavily weighted towards Western Countries, including the most powerful, the United States.

372. Of course, this will still omit smaller States, as well as militarily weak States. Yet given the role of the Council in maintaining international peace, it seems wise to continue to include larger, relatively more powerful States as permanent members. All States, at least theoretically, have the opportunity to be elected to nonpermanent seats. See also Reisman, *supra* note 48, at 97–99. Reisman proposes formation of a chapter VII consultation committee to meet with the Council whenever it goes into a chapter VII decision mode. The Council would share its views as well as solicit the views and perspectives of this 21 member committee. *Id.*

373. See *Reapportion the Security Council*, *supra* note 369; Littlejohns, *supra* note 369; Annika Savill, *U.S. Backs Expansion of Security Council; Britain Resists Change that Would Dilute its Permanent Five Position*, INDEPENDENT (London), June 11, 1993, at 11.

would determine the specific country that occupies a regional seat at any particular time.³⁷⁴

C. Permanent Forces Under U.N. Command

Finally, in *An Agenda for Peace*, Secretary General Boutros-Ghali called for the establishment of readily-available armed forces, on call, as a means of deterring "breaches" of the peace. Potential aggressors would know that the Council had at its disposal a means of response, making the force a deterrent.³⁷⁵ There is already authority in the Charter under article 43, whereby Member States and the United Nations can enter into special agreements to make armed forces, assistance, and facilities available to the Security Council for the purposes in article 42 — that is for enforcement. These agreements should be negotiated.³⁷⁶ Forces would be available on a permanent, rather than on the current ad hoc, basis. These forces would be for enforcement, not peacekeeping, however, which makes delineating the distinction between peacekeeping and peace enforcement all the more important.³⁷⁷

Any forces that are authorized to use force and are operating without consent ought properly to be termed enforcement forces and come from the permanent forces proposed by the Secretary General. The need for adequate training, coordination, and discipline have been tragically illustrated in Somalia.³⁷⁸ This would also mean the United Nations would have more control over actions taken in its name. The desire for multi-lateral, versus unilateral, action under a U.N. banner, was demonstrated during the debates on the U.N. Task Force in Somalia. Many Member States spoke in favor of increased control by the United Nations over the

374. Size, military strength, gross domestic product, political influence, and strength might be a few of the factors considered.

375. See BOUTROS-GHALI, *supra* note 10, at 25.

376. U.N. CHARTER art. 43. These agreements have never been concluded, primarily because of Cold War hostilities, although early studies and attempts were made. In BOUTROS-GHALI, *supra* note 10, the Secretary General recommended that the Security Council initiate negotiations in accordance with article 43, with the support of the Military Staff Committee.

377. *Id.* Given recent events in Somalia, where U.N. peacekeepers have been attacked and murdered, and have themselves shot civilians and engaged in retaliatory air strikes and raids, the necessity of making this distinction and thus insuring that troops are well trained and equipped for a well-defined mandate could not be clearer. See Lucia Mouat, *Recruiting Peacekeepers for High-Stakes Missions*, CHRISTIAN SCI. MONITOR, June 16, 1993, at 7.

378. The turmoil surrounding Italian forces in Somalia illustrates the need for a strong mandate and a central command. See S.C. Res. 814, *supra* note 26; Richard Bernstein, *Italian General Who Refused Order in Somalia is Removed*, N.Y. TIMES, July 15, 1993, at A10; Alan Cowell, *Italy, in U.N. Rift, Threatens Recall of Somalia Troops*, N.Y. TIMES, July 16, 1993, at A1; Alan Ferguson, *Italy Refuses to Pull General Who Ignored Orders from U.N.*, TORONTO STAR, July 17, 1993, at A18.

Task Force's actions. One of the options presented was a U.N. force under the control of the Secretary General; this was the preferred option of many.³⁷⁹ Moreover, as in Iraq, that the force was led primarily by one State, tended to raise questions of legitimacy. An established force would help put to rest perceptions that the United Nations is acting at the bidding of a particular State.³⁸⁰ The U.N. failure to take forceful action in Bosnia and Hercegovina has been linked to the refusal of the United States and others to commit ground forces. Since there is no permanent force to fill the void, the result is no action at all. A U.N. force would also make it less likely for this result to transpire.

Furthermore, as the United Nations goes into more internal conflicts where the operations are infinitely more difficult,³⁸¹ and sensitivities as to sovereignty higher, the use of a force trained and operating under U.N. command would hopefully add to more efficient operations. Given the increasing danger, it has become increasingly difficult to obtain troops.³⁸² Moreover, the sheer number of U.N. operations necessitates closer coordination and control.³⁸³ Somalia is the first case in which the United Nations has had command and control of an operation under chapter VII.³⁸⁴ This indicates that the trend is towards U.N. operations under U.N. control and that the time has come to make it a U.N. action under a proficient, strong, and permanent force.

379. See S/PV.3145, *supra* note 188. The Secretary General and several States acknowledged however, that the United Nations was not equipped to undertake such a task at the present time. Still, there was more reporting by UNITAF than any previous force, and there were many statements in favor of increased control over forces operating under the auspices of the United Nations.

380. Arend, *supra* note 217, at 530.

381. Often the mandates are unclear and constantly expanding, while the resources may not expand in tandem. Because the United Nations does not have permanent forces and must operate on an ad hoc basis, it may not be able to amass sufficient forces to deal with a particular crisis. Moreover, it may be dealing with political elements which are not States and do not respect the U.N. mandate or authority. Paul Lewis, *U.N. Is Developing Control Center to Coordinate Growing Peacekeeping Role*, N.Y. TIMES, Mar. 28, 1993, at A10 (citing the comments of Undersecretary General Marack Goulding on dealing with despots and warlords who cannot conclude agreements and how this leads to the use of force).

382. Mouat, *supra* note 377, at 7; Akhbar Al-Yawn, *U.N. Chief Boutros-Ghali Contrasts Somalia, Bosnia*, MIDDLE E. NEWS NETWORK, Dec. 26, 1992 (translated from Arabic).

383. As of March 1993, there were 60,000 peacekeepers in the field carrying out thirteen operations. See Lewis, *supra* note 364, at A5. This has led to an overhaul of how these operations are run and the new command and control center at the United Nations to keep headquarters constantly linked with its numerous peacekeeping operations.

384. This is more comprehensive than the Congo where force was authorized, at least theoretically, only in self defense. Korea and Iraq were really U.S. actions authorized by the Organization.

CONCLUSION

The United Nations will increasingly be called upon to intervene in internal conflicts. As long as it is summoned by the affected State or that State consents to the intervention, there will be few problems with domestic jurisdiction questions and hopefully much to be gained in resolving disputes. If the United Nations can assist, through peaceful settlement mechanisms, in ending or preventing the militarization of conflicts, this will greatly benefit the peoples of the world who are killed, maimed, and raped in such conflicts, and whose lives are tragically and permanently disrupted. It is when consent is not forthcoming that we must carefully review options and creatively promulgate solutions. If there is a "danger" to the peace, there is international jurisdiction, even if it is only recommendatory. There is also authority to investigate, albeit with consent. Given recent events, many parties to internal conflicts, at some stage, will want to take advantage of the many peaceful settlement mechanisms available through the United Nations, although the results may not always be successful.

If peaceful settlement mechanisms fail, the Council has potential jurisdiction and must decide whether to take recommendatory or mandatory measures; that is, if it is a "danger" or "threat" to the peace. Recent decisions indicate a large departure from past precedent. In reaching the minimum finding of "threat" to the peace, which permits the imposition of mandatory measures which include force, the international community must begin carefully to appraise whether and when an internal conflict is a "threat" to the peace and then apply that standard with some consistency. Given that inter-State conflict is no longer the yardstick, there must be an honest appraisal of this issue in a reformed system that systematically takes into account multiple and diverse voices in formulating norms and includes additional varied perspectives in implementing them. Failure to do so could eventually lead to a crisis of legitimacy and raise many of the problems entailed in unilateral intervention.

Currently the international community, often with the very best of intentions, is groping towards solutions. Given the myriad situations that may present themselves, there will always be exceptions and we must allow room for flexibility and innovation. Nonetheless, parameters must be developed. Clearly, there is some uncertainty; legal standards, which alone may be insufficient, can at least assist in bringing about some clarity.

Finally, the United Nations should continue to assume its traditional role of remaining a neutral party in internal conflicts. While this role has permitted the Organization to assume multiple and varied functions to

assist peoples in resolving their differences and deciding upon political solutions, it has meant not making that decision for them by, for example, deciding which party is the appropriate party to prevail. To do so severely risks drawing the United Nations into quagmires where it becomes the target rather than the mediator. Such action is also of doubtful legality, given other Charter principles such as self-determination, and will make States and insurgents less willing to stop fighting and call upon the United Nations. Despite the sometimes hard choices this may at times entail, in the long run it will permit the Organization to assist in alleviating many more conflicts. This would be a step forward for us all.

